79-1489

No. 79-1404

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

PENNHURST PARENTS-STAFF ASSOCIATION,
Petitioner,

v.

TERRI LEE HALDERMAN, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Pennhurst Parents-Staff Association, intervenor in the suit below, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (App. A, *infra*, 1a-97a), issued on December 13, 1979, and is not yet officially reported. The opinion of the United States District Court for the Eastern District of Pennsylvania issued on December 23, 1977, and its order issued on March 17, 1978 (App. C, *infra*, 102a-170a); both appear at 446 F.Supp. 1295.

JURISDICTION

The judgment of the Court of Appeals (App. B, *infra*, 98a-101a) was entered on December 13, 1979.[1] On March 10, 1980, Mr. Justice Brennan extended the time for filing this petition until April 11, 1980. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the provisions of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6000 *et seq.* (1975 & 1978 amend.) (the "DD Act" or the "Act"), set forth in its entirety in App. D, *infra*, 171a-210a.

QUESTIONS PRESENTED

1. Whether the DD Act implicitly creates a private right of action authorizing a federal court to: (a) determine which facility is best suited for housing each mentally retarded person; (b) order a state to create new facilities for such persons; and (c) monitor the on-going provision of care at such facilities.

2. Whether the DD Act creates a legally enforceable presumption in favor of community-based care regardless of state resources or state plans for providing such care.

3. Whether the Court of Appeals erred in failing to direct the district court to decertify the plaintiff class when it became clear that the interests of the named plaintiffs, who sought to close a state institution for the retarded, were antagonistic to those members of the class who sought to retain their residence in an improved state institution.

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[1] The mandate was recalled by the court on March 4, 1980, and petitioner's motion to intervene for the purpose of filing a petition for a writ of certiorari was granted (App. F, *infra*, 218a-219a).

STATEMENT

This class action was brought in May 1974 on behalf of all current and potential future residents of the Pennhurst State School & Hospital, a Pennsylvania facility that houses more than 1,000 mentally retarded citizens. Proceeding pursuant to 28 U.S.C. §§ 1331, 1343(3), plaintiffs, several individuals at Pennhurst, as well as an organization of some parents and families of Pennhurst residents,[2] alleged that Pennhurst operated in a manner that violated a variety of its residents' constitutional and statutory rights. They sought damages and injunctive relief that would require, *inter alia*, that Pennhurst be closed and its residents placed in new, small, community-based facilities.[3] Defendants, the State of Pennsylvania, various counties within Pennhurst's service area, and several state and county officials responsible for the care of mentally retarded citizens in Pennsylvania, acknowledged the institutional deficiencies at Pennhurst, but disputed that any federal or state constitutional or statutory violations could be shown.

After a 32-day trial, the district court (Broderick, J.) denied plaintiffs' damages claims, but granted their request for injunctive relief. *Halderman* v. *Pennhurst State School & Hospital*, 446 F.Supp. 1295 (E.D.Pa. 1977). Finding conditions at Pennhurst to be deficient, the court ruled that the facility violated its residents' constitutional rights to "minimally adequate habilitation," *id.* at 1314, to be "free from harm," *id.* at 1320,

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[2] The organization was the Parents and Family Association of Pennhurst, which, at the outset of the litigation, claimed to represent 200 parents of retarded citizens at Pennhurst. App. at 108a.

[3] After the litigation was initiated, several additional individual plaintiffs, as well as the Pennsylvania Association for Retarded Citizens and the United States, were granted leave to intervene as plaintiffs, requesting essentially the same relief as the initial plaintiffs.

and to "non-discriminatory habilitation," *id.* at 1321,[4] as well as their federal statutory right to "non-discriminatory habilitation" under 29 U.S.C. § 794 (1973), *id.* at 1323,[5] and their state statutory right to "minimally adequate habilitation" under 50 Pa. Stat. Ann. §§ 4201 *et seq.*, *id.* at 1322.[6]

The remedy fashioned by the district court sought not to improve the conditions at Pennhurst, but to close the facility altogether:

> In view of the Court's finding that institutionalization at Pennhurst is not conducive to normalization, which is vital to the habilitation of the retarded, our Order must provide that immediate steps be taken to remove the retarded residents from Pennhurst. 446 F.Supp. at 1325.

The court then entered an order requiring, *inter alia*, that Pennsylvania close Pennhurst and provide suitable community living arrangements for its residents. To implement its decree, the court appointed a master with instructions essentially to: (1) devise a plan for assuring community placement of each current and potential resident of Pennhurst; (2) identify and provide for the resources and staff necessary for implementing the plan;

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[4] These constitutional rights were based on the Eighth Amendment proscription of cruel and unusual punishment, and the due process and equal protection clauses of the Fourteenth Amendment.

[5] This section provides: "No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Section 794 was amended in 1978 in ways irrelevant to the issue in this case. Rehabilitation, comprehensive services, and Developmental Disabilities Act of 1978, Pub. L. No. 95-602, Title I, §§ 119, 122(d)(2), 92 Stat. 2982, 2987.

[6] In relevant part, this statute provides: "The department [of public welfare] shall have power, and its duty shall be: (1) To assure within the State the availability and equitable provision of adequate mental health and mental retardation services for all persons who need them. . . ."

(3) establish a mechanism to monitor the ongoing provision care to these people; and (4) create a plan for the operation of Pennhurst until it could be closed.

On appeal, the United States Court of Appeals elected to hear the case *en banc* after a panel was unable to agree upon a majority decision. On December 13, 1979, a sharply divided court, relying on a legal approach that differed almost entirely from that of the district court, largely affirmed the relief ordered below. *Halderman* v. *Pennhurst State School & Hospital*, —— F.2d —— (3d Cir. 1979). The majority ruled that the DD Act created an implied federal right of action for mentally retarded citizens with respect to the rights therein enumerated. Specifically, the court found that the Act provides a judicially-enforceable federal right to habilitation,[7] and that such habilitation must be provided "in the setting that is least restrictive of the person's personal liberty." App. at 38a. Discerning a congressional preference for community-based living arrangements—in contrast to institutional settings such as Pennhurst—the court concluded that "on remand, the [district] court or the Master should engage a presumption in favor of placing individuals in CLA's [*i.e.*, community living arrangements]." App. at 62a-63a.

Turning to the question of appropriate relief, the court vacated that part of the district court's injunction ordering that Pennhurst be closed, finding that despite Con-

[7] Invoking its pendent jurisdiction, the court also found a similar implied right of action under state law, 50 Pa. Stat. Ann. §§ 4201 *et seq.* The court made plain, however, that the state law right assures only that "to the extent Pennsylvania maintains facilities for the mentally handicapped, those facilities must provide adequate treatment or habilitation." App. at 34a. Thus, in contrast to the federal statutory relief ordered, the state statute provides no basis for the creation of new community facilities; nor does it create a presumption in favor of placement in such facilities. Accordingly, petitioner does not contest the Court of Appeals' interpretation of state law.

gress' preference for community facilities, the Act "did not anticipate a shutdown of all institutions. . . ." App. at 61a.[8] The Court, however, upheld the decision to certify the case as a class action despite the fact that petitioner had filed a motion to intervene and a brief amicus curiae in opposition to class certification.[9] It also ruled that the appointment of a master was appropriate to implement the detailed relief ordered, and rejected defendants' Eleventh Amendment claims, finding that, although the relief might be costly, it was pursuant to an injunction and therefore not barred by *Edelman* v. *Jordan*, 415 U.S. 651 (1974).

Chief Judge Seitz, joined by Judges Aldisert and Hunter, dissented. In their view, the majority decision

> goes far beyond the proposition that federal courts should require the state to eliminate the deplorable conditions at Pennhurst. The effect of the rule is to require the state to create new facilities regardless of the feasibility or practicality of such a course

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[8] The Court of Appeals also vacated the order insofar as it required the defendants to find alternative employment for all Pennhurst employees.

[9] Pennhurst Parents-Staff Association is an organization of approximately 500 members, almost 95 percent of whom are parents, guardians or close relatives of Pennhurst residents. The Association did not participate in the district court proceedings. Alarmed at that court's decision, however, including especially the order to close Pennhurst, the Association moved to intervene after judgment. Its motion was denied because a notice of appeal had already been filed by one of the defendants. On appeal, the Court of Appeals, sitting *en banc*, in a companion case to the instant one, also rejected the Association's motion to intervene, noting that the Association's position would be pressed by other litigants and that it could file an amicus curiae brief. *See* App. E, *infra*, at 211a-217a. The court did state, however, that its decision denying the Association's motion to intervene was "without prejudice to any motion that [it] might want to make to intervene for the purpose of petitioning to the United States Supreme Court for a writ of certiorari. . . ." *Id.* at 216a. Such a motion was filed on February 28, 1980, and granted by an *en banc* decision of the court on March 4, 1980. *See* App. F, *infra*, at 218a-219a.

> of action. Moreover, because persons develop over time, the federal courts will become embroiled in almost continual supervision to ensure that each individual at any particular moment is in the least restrictive environment.
>
> Although I believe improvement of Pennhurst to be mandatory, I do not believe a federal court may dictate to the state the type of treatment that best suits every individual. In my view, as long as the state runs all of its facilities free of the types of conditions that exist at Pennhurst today, then the state must be given latitude to choose in which of the facilities it will place a given individual. A federal court should remove a person from an institution or forbid a particular mode of treatment only in very limited circumstances. Because I can find no basis for the rule announced by the majority in statute or Constitution, I dissent from that portion of its opinion mandating a general right to individualized treatment in the least restrictive environment. App. at 66a-67a.

Accordingly, the dissent found that, even assuming it provided a private right of action for some purposes, the DD Act, while seeking to encourage the use of community settings, creates neither a legally enforceable duty against the state to assure the development of new community facilities, nor a legal presumption mandating placement of virtually all retarded citizens in such settings. The dissent also rejected plaintiffs' other federal and state statutory claims and federal constitutional claims.

REASONS FOR GRANTING THE WRIT

1. The decision by the Court of Appeals, if allowed to stand, will transfer to federal district courts the principal responsibility for care of mentally retarded citizens in this nation. Under that decision, the federal courts, rather than state or local governments, must de-

termine the appropriate placement for each of the more than one hundred thousand retarded citizens covered by the DD Act. If they deem it desirable, the district courts may also order the states to develop completely new facilities rather than to upgrade or redesign existing ones. Once these initial decisions have been made, moreover, the federal courts may monitor the ongoing provision of care at the designated facilities in order to assure that the treatment remains appropriate. As the dissent below properly stated, the decision "implicates massive and continual involvement of the federal judiciary in the multiple problems of the mentally retarded." App. at 96a.

This Court has repeatedly admonished federal district courts against assuming the responsibility for administering institutions and programs traditionally reserved to other authorities. *See Bell* v. *Wolfish*, 99 S.Ct. 1861 (1979); *Rizzo* v. *Goode*, 423 U.S. 362, 378-80 (1976). Indeed, in two recent companion cases involving the placement of mentally ill and mentally retarded children in state facilities, the Court specifically cautioned against over-involvement of the federal courts in these areas, making plain that "neither judges nor administrative hearing officers are better qualified than psychiatrists to render psychiatric judgments." *Parham* v. *J.R.*, 99 S.Ct. 2493, 2506-07 (1979), *quoting In re Roger S.*, 19 Cal.3d 921, 941, 569 P.2d 1286, 1299 (1977) (Clark, J., dissenting); *Secretary of Public Welfare of Pennsylvania* v. *Institutionalized Juveniles*, 99 S.Ct. 2523 (1979). The decision below radically contravenes these principles, substituting a Master, appointed by a federal court, for the state administrators and professionals who would otherwise have the responsibility for providing care to retarded citizens.

Absent review by this Court, the effects of the decision below will not easily be undone. Once federal courts be-

gin the transfer of mentally retarded persons to different facilities and order construction of new facilities rather than improvement of existing ones, it will be too late to declare that the responsibility rested with the states all along. At the very least, the residents of the facilities will be subjected to needless confusion and dislocation. Moreover, the decision below may encourage other federal district courts to follow suit in the large number of pending cases patterned on the instant one. *See, e.g., Connecticut Association for Retarded Citizens* v. *Mansfield Training School*, Civ. No. H-78-653 (D.Conn., filed December 6, 1978); *Garrity* v. *Gallen*, Civ. No. 78-116 (D.N.H., filed April 12, 1978); *Society for Goodwill to Retarded Children, Inc.* v. *Carey*, Civ. No. 78-C-1847 (E.D.N.Y., filed August 23, 1978); *Kentucky Association for Retarded Citizens* v. *Conn*, Civ. No. C-78-0157 LA (W.D.Ky., filed May 16, 1977); *Washington Association for Retarded Citizens* v. *Thomas*, Civ. No. C-79-1235V (W.D.Wash., filed October 22, 1979).

In contrast to the approach below, the Fourth Circuit has recognized that the DD Act provides no license for federal courts to take over the administration of state programs for the mentally retarded. *United States* v. *Solomon*, 563 F 2d 1121 (1977). In *Solomon*, the court held that the Attorney General of the United States had no authority to sue to enforce the provisions of the DD Act. Considering the portion of the Act's legislative history that referred to the right to a judicial forum for protection of the right to treatment, *id.* at 1125, the *Solomon* court stated that it "manifestly refers to a state judicial forum and not to a federal judicial forum where the United States customarily sues," *ibid.*[10] This position is plainly inconsistent with the holding of the Third Cir-

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[10] The Third Circuit expressly declined to follow the reasoning of *Solomon* in this case. App. at 11a-12a.

cuit that the Act creates rights to be redressed in federal court.[11]

2. The decision of the Court of Appeals, imposing a mandatory duty to provide community care for mentally-retarded persons and implying a private right of action to enforce it, finds no basis in the DD Act. To the contrary, the Act and its legislative history demonstrate that Congress carefully avoided the imposition of inflexible requirements on the states, preferring instead to allow the states to develop their own programs within general guidelines. Moreover, Congress selected various methods for assuring compliance with the Act, without giving any authority for private rights of action. The Court of Appeals simply created a new legislative scheme to replace the one enacted by Congress.

A. It is undisputed that the DD Act creates no express right of action for private parties. The Court of Appeals, by applying the four-factor analysis established in *Cort* v. *Ash*, 422 U.S. 66 (1975), nevertheless decided that a private right of action was implied in the Act. *See Cannon* v. *University of Chicago*, 99 S.Ct. 1946 (1979).[12] In our view, that conclusion stretches the *Cort*

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[11] The Third Circuit also adopted a markedly different position from that of the Fourth Circuit on the right of the United States to maintain a suit or to intervene in actions founded on the DD Act. *Compare* 563 F.2d at 1125-29, *with* App. at 9a-13a. In *Solomon*, the court ruled that, in the absence of a clear congressional expression to the contrary, the doctrine of separation of powers restrains the Attorney General from bringing a suit to enforce the Act. *See also United States* v. *Mattson*, 600 F.2d 1295 (9th Cir. 1979). The decision below, by contrast, rejected the separation of powers analysis, and upheld the United States' right to intervene in the suit under Fed.R.Civ.P. 24(b).

[12] The court must ascertain:

(1) Whether the statute was enacted for the "especial benefit" of a class of which plaintiff is a member;

(2) Whether there is any explicit or implicit indication of a legislative intent either to create or deny such a remedy;

[Continued on page 11]

v. *Ash* test beyond the breaking point.[13]

We do not question, of course, that the Act was intended to benefit developmentally disabled persons. But that fact is the beginning, not the end, of the inquiry. *See Santa Clara Pueblo* v. *Martinez*, 98 S.Ct. 1670 (1978). As this Court recently noted, there is

> far less reason to infer a private remedy in favor of individual persons if Congress, instead of drafting [the statute] with an unmistakable focus on the benefited class, had written it simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices. *Cannon* v. *University of Chicago, supra*, 99 S.Ct. at 1955 (footnote omitted).

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[12] [Continued]

(3) Whether creation of a private remedy would frustrate or enhance the underlying purpose of the legislative scheme; and

(4) Whether implying a federal remedy is inappropriate because the subject matter involves an area "traditionally relegated to state law."

Cort v. *Ash, supra*, 422 U.S. 66, 78 (1975); *see also Cannon* v. *University of Chicago*, 99 S.Ct. 1946, 1953 & n.9 (1979).

[13] As the Court below recognized, App. at 28a, a decision in this case will almost certainly have significant ramifications not only for similar suits brought under the DD Act, but for suits asserting implied remedies under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1973 & 1978 amend). Many such suits, including this one, have been brought under § 504. *Rogers* v. *Frito-Lay, Inc.*, Nos. 77-2443, 77-3263 (5th Cir. February 15, 1980); *New Mexico Association for Retarded Children* v. *New Mexico*, No. 75-6330M (D.N.M. January 1, 1980); *Miener* v. *Missouri*, No. 79-1050C (2) (E.D.Mo. January 25, 1980).

This Court has heretofore expressly reserved decision on the question of any remedies implied by § 504. *See Southeastern Community College* v. *Davis*, 99 S.Ct. 2361, 2366 n.5 (1979).

Since the DD Act is principally a federal financial assistance statute, there is reason to conclude that it lacks the "unmistakable focus" to which *Cannon* refers.[14]

But even assuming that the Act has the requisite special "focus," its structure and purposes nonetheless strongly indicate that Congress deliberately chose not to provide a private right of action. As this Court has recognized, Congress may establish a system that depends for enforcement on specified administrative action, rather than on individualized action in federal courts. *See, e.g., National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453 (1974); *Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 297, 300-01 (1943).[15] That is precisely what Congress has done in the DD Act.

The Act contains a clear and comprehensive scheme to vindicate the interests it seeks to protect. That scheme rests primarily on the administrative authority of the Secretary of Health, Education and Welfare. For example, the Secretary is empowered to condition payment of each state's federal allotment on the filing with and approval by the Secretary of a state plan for the provision of services to the developmentally disabled, 42 U.S.C. § 6063; on the filing with and approval by the Secretary of a state plan for implementing an evaluation system to monitor the effectiveness of funded programs, 42 U.S.C. § 6063; and on the preparation for each participant in a state program receiving federal funds under

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[14] It bears noting that, when Congress has intended to make a private right of action available to enforce rights established in a federal financial assistance statute, it has done so in clear and unmistakable terms. *See, e.g.*, 42 U.S.C. § 6104(e)(1) (1978).

[15] In *Switchmen's Union*, the Court specifically noted that Congress had created not only a right but a means of enforcing it, stating: "Congress for reasons of its own decided upon the method for the protection of the 'right' which it created. It selected the precise machinery and fashioned the tool which it deemed suitable to that end." 320 U.S. at 301.

the Act of a detailed, individual "habilitation plan" meeting statutory and regulatory requirements, and subject to annual review, 42 U.S.C. § 6011. Following notice to and opportunity for hearing by the state, the Secretary may, if compliance has not been otherwise achieved, disapprove state plans and terminate federal funding. 42 U.S.C. § 6063. The Act specifically provides, moreover, that the United States Court of Appeals for the state in question shall hear all state objections to adverse decisions by the Secretary. 42 U.S.C. § 6068.

Congress even went beyond this federal administrative enforcement scheme and mandated, as a condition to federal aid, that each state establish an Office of Protection and Advocacy to protect the beneficiaries of the Act. 42 U.S.C. § 6012. This office must "have the authority to pursue legal, administrative, and other appropriate remedies to insure the protection of the rights of such persons who are receiving treatment, services, or habilitation within the State." *Ibid.* Thus, Congress provided an express mechanism for enforcing existing rights and remedying individual grievances, without creating yet another set of federal remedies inherent in establishing a private right of action.

The purposes of the legislative scheme also leave little ground for inferring a cause of action from the Act. The "overall purpose" of the Act is "to *assist* States to assure that persons with developmental disabilities receive the care, treatment, and other services necessary . . ." (emphasis supplied).[16] The approach sanctioned below,

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[16] The "Congressional declaration" at the outset of the Act likewise describes its specific purposes as:

> (A) to assist in the provision of comprehensive services to persons with developmental disabilities . . .
>
> (B) to assist States in appropriate planning activities . . .

[Continued on page 14]

far from assisting the States, improperly displaces their authority in favor of administration by a federal court. *See Santa Clara Pueblo* v. *Martinez, supra*, 98 S.Ct. at 1677-80. Moreover, the finite resources available to the states may be diverted from care of the disabled to defense of the numerous individualized lawsuits that may be expected to arise, a result that ultimately undercuts the intention of the Act. *See id.* at 1681.

Finally, and perhaps most critical in this case, the creation of a federal right of action will seriously erode the traditional role of the state as *parens patriae*. *Parham* v. *J.R., supra*. The Act is explicit that no such reduction in state authority is intended:

> Except as otherwise *specifically* provided, nothing in this chapter shall be construed as conferring on any Federal officer or employee the right to exercise any supervision or control over the administration, personnel, maintenance, or operation of any facility for persons with developmental disabilities with respect to which any funds have been or may be expended under this chapter. 42 U.S.C. § 6003 (emphasis supplied).

It is simply incompatible with this provision to allow federal courts, under the guise of ordering "appropriate treatment," to take control of all decisions regarding

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[16] [Continued]

> (C) to make grants to States and public and private, nonprofit agencies to establish model programs, . . .
>
> (D) to make grants to university affiliated facilities to assist them in administering and operating demonstration facilities . . . [and]
>
> (E) to make grants to support a system in each State to protect the legal and human rights of all persons with developmental disabilities.

42 U.S.C. § 6000(b)(2) (1978 amend.)

treatment facilities and to exercise continuing supervision over the operation of such facilities.[17]

In short, despite the obvious concern of Congress to improve care for the mentally retarded, there is no indication that Congress intended to achieve that goal through private suits in federal court. Rather, Congress provided methods of enforcement that protect the rights of the retarded without stripping the States of primary responsibility for the care of their own citizens. The Court of Appeals erred, therefore, in concluding that the DD Act impliedly authorizes private suits to enforce its provisions.

B. Turning to the merits, the Court of Appeals found that the DD Act requires every state to provide "community living arrangements" for each of its retarded citizens, except for those "probably comparatively rare" individuals who absolutely require institutionalization. App. at 45a. As Chief Judge Seitz observed in dissent, "[t]he effect of th[is] rule is to require the state to create new facilities regardless of the feasibility or

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[17] The actual extent of the displacement of state authority is dramatically illustrated by developments in the instant case. On remand from the Court of Appeals, the district court entered a memorandum opinion and order on February 22, 1980, to govern implementation. (App. G, *infra*, 220a-231a.) The order requires that a group consisting of the resident, his or her parent or guardian, an advocate or next friend for the resident, and the case manager responsible for the resident's care prepare an individual treatment plan designating the appropriate setting for each Pennhurst resident. App. at 225a. All disputes within this group initially are to be resolved by the Master. *Ibid.*

In addition, the order mandates the appointment of a second Master, called a "Hearing Master," to conduct individualized hearings when the initial Master cannot resolve disputes informally. The Hearing Master, or any of the parties to the hearing, may compel the production of witnesses and other evidence, and must tape record the hearing. App. at 227a. Upon completion of the hearing, the Hearing Master must issue a report as to the appropriate placement for the person under consideration. Objections to this report may be filed with the court. App. at 228a.

practicality of such a course of action." App. at 67a. The Act contains no such requirement.

The Court of Appeals first overstates the objectives of the Act and then proceeds to recast these objectives into obligations. Section 6010(2) of the Act, on which the court below primarily relies, directs that "[t]he treatment, services, and habilitation for a person with developmental disabilities . . . *should be* provided in the setting that is least restrictive of the person's personal liberty." (Emphasis supplied.) Similar admonitions are repeated throughout the Act. But it is a very different matter to say that Congress intended the states immediately to relocate all but a handful of patients to community-based facilities, whatever the cost, feasibility or appropriateness might be.

Nothing in the Act suggests that institutional settings, such as Pennhurst, are inappropriate for all but a few, "probably comparatively rare" mentally retarded individuals. On the contrary, the least restrictive setting for each retarded person depends upon his or her individual needs as well as the realistic alternative placements available.[18] In contrast to the court below, Congress foresaw no panacea in the hollow slogan of "community care." Rather, it realized that deinstitutionalization is the preferred approach for those mentally retarded citizens who can properly benefit from quality community care.

The dissent of Chief Judge Seitz discusses in persuasive detail the materials showing that Congress established a goal of community care where appropriate, not

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[18] Indeed, petitioner believes that for many developmentally disabled persons, particularly those who are profoundly or severely retarded, a large congregate institution that offers diverse, quality programs will afford more respect for and protection of the person's liberty than would life in a small discrete, community facility.

an inflexible requirement. App. at 68a-72a. The governing regulations of HEW, for example, do not impose the duty created by the Court of Appeals but require only that the states "support" community programs "to the maximum extent feasible." 45 C.F.R. § 1386.43 (1978). Reviewing that provision, the dissent aptly observed: "I fail to see how a duty to 'support' 'feasible' non-institutional care can be elevated to an absolute duty to provide the least restrictive treatment for every individual regardless of cost or available resources." App. at 70a.

The legislative history supports the same view. Discussing the provisions regarding community care, the pertinent House Report stated:

> Since the Committee is well aware that current theory with regard to the treatment and support of the developmentally disabled emphasizes that this treatment should be conducted in the individual's community without unnecessarily institutionalizing him, the Committee has chosen to include a specific requirement that state programs *plan for as much deinstitutionalization as is feasible*, and earmark monies for this purpose. Knowing that this may require some increase in expenditures, the Committee has also increased the authorization of appropriations.
>
> It is anticipated that these requirements *will prompt some movement* of patients from State institutions back into their communities. *It is hoped* that corresponding amounts of State and other funds currently being spent on institutional care will be re-budgeted for community care, an obvious re-budgeting that has not always occurred in conjunction with deinstitutionalization efforts.

House Rep. No. 94-58, 94th Cong., 1st Sess. 10, *reprinted in* 2 [1975] U.S. Code Cong. & Ad. News 919, 928, *quoted in Halderman* v. *Pennhurst*, App. at 70a (Seitz, C.J., dissenting) (emphasis supplied). This his-

tory strongly indicates that the Act imposes only obligations of good faith effort and that it intentionally leaves needed discretion to the states. The decision below drastically distorts this legislative approach.

3. The Court of Appeals compounded the effects of its error by affirming the certification of this case as a class action. As a consequence, the large number of Pennhurst residents represented by petitioner have had their interests litigated by representative plaintiffs with objectives directly antagonistic to their own. This approach is not only indefensible under Rule 23(a) of the Federal Rules of Civil Procedure but is directly contrary to the constitutional teachings of *Hansberry* v. *Lee*, 311 U.S. 32 (1940).

When this suit began in 1974, the representative plaintiffs sought to compel the improvement of the Pennhurst facility, rather than its closing, an objective with which no resident of Pennhurst could disagree. On November 29, 1976, therefore, the district court certified a plaintiff class including "all persons who as of May 30, 1974, and at any time subsequent, have been or may become residents of Pennhurst . . ." App. at 7a. Following that certification, however, the representative plaintiffs dramatically shifted course, seeking to close Pennhurst entirely. At that point, they were no longer qualified to represent the interests of class members like those represented by petitioner, who believed that the closing of Pennhurst would cause considerable harm.

Rule 23(a), Fed. R. Civ. P., states that "[o]ne or more members of a class may sue * * * as representative parties on behalf of all *only if* * * * (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." (Emphasis added.) It is impossible to say, however, that a class member seeking to

close Pennhurst has a claim typical of the claims of members seeking to keep it open or that he will fairly and adequately protect the adverse interests of other members of the class. *See Kremens* v. *Bartley*, 97 S.Ct. 1709 (1977). Once the district court was made aware that the class was fragmented,[19] it should have "carefully scrutinize[d] the adequacy of representation" and "eliminate[d] so far as possible the likelihood that . . . plaintiff ha[d] interests antagonistic to those of the remainder of the class," *Eisen* v. *Carlisle & Jacquelin*, 391 F.2d 555, 562 (2d Cir. 1968) (citation omitted). Indeed, the need for such scrutiny was especially important in this case because dissenting class members had no right to "opt out" of the suit. The district court, however, failed to provide any relief at all.[20]

This Court has made plain that due process does not permit the rights of absent parties to be represented by a person hostile to them. Rejecting that notion in *Hansberry* v. *Lee*, *supra*, the Court observed:

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[19] Individual class members submitted letters to the Court, expressing their distress and fear at the closing of Pennhurst. Although these letters were sent after trial, it is apparent that, in view of the nature of the class, the lack of sophistication in its organization, and the fundamental change in the nature of the suit, this notice was adequate to inform the court that class certification was no longer appropriate.

[20] The Court of Appeals affirmed the class certification, saying that the views of dissident class members could be expressed during the "relief stage," which may ultimately require individualized hearings for each of the approximately 1200 residents of Pennhurst. That is not a satisfactory result. Not only will such hearings be costly, lengthy, and possibly unworkable, but they will be subject to an unwarranted class-wide presumption in favor of community facilities. That presumption has been imposed on all class members despite the fact that it is contrary to the best interests of many of them. It will be too late to challenge the existence of that presumption at the hearings on relief. *See* Appendix G, *infra*.

> It is one thing to say that some members of a class may represent other members in a litigation where the sole and common interest of the class in the litigation, is either to assert a common right or to challenge an asserted obligation. It is quite another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class, so that any group merely because it is of the class so constituted, may be deemed adequately to represent any others of the class in litigating their interests in either alternative. Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires. *Id.* at 44-45 (citations omitted).

Those principles, fully applicable here, were simply ignored by both courts below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendices

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 78-1490, 78-1564 and 78-1602

TERRI LEE HALDERMAN, a retarded citizen, by her mother and guardian, Winifred Halderman; LARRY TAYLOR, a retarded citizen, by his parents and guardians, Elmer and Doris Taylor; KENNY TAYLOR, a minor, a retarded citizen, by his parents and guardians, Elmer and Doris Taylor; ROBERT SOBETSKY, a minor, a retarded citizen, by his parents and guardians, Frank and Angela Sobetsky; THERESA SOBETSKY, a retarded citizen, by her parents and guardians, Frank and Angela Sobetsky; NANCY BETH BOWMAN, a retarded citizen, by her parents and guardians, Mr. and Ms. Horace Bowman; LINDA TAUB, a retarded citizen, by her parents and guardians, Mr. and Mrs. Allen Taub; GEORGE SOROTOS, a minor, a retarded citizen by his foster parents, William and Marion Caranfa, all of the above individually and on behalf of all others similary situated; THE PARENTS AND FAMILY ASSOCIATION OF PENNHURST

PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS, JO SUZANNE MOSKOWITZ, a minor, by her parents and next friends, Leonard and Nancy Moskowitz, ROBERT HIGHT, a minor, by his parents and next friends, John and Jeanne Hight, DAVID PREUSCH, a minor by his parents and next friends, Calvin and Elizabeth Preusch, and CHARLES DINOLFI, On behalf of themselves and all other similarly situated,

Plaintiffs-Intervenors

UNITED STATES OF AMERICA,
Plaintiff-Intervenor

VS.

PENNHURST STATE SCHOOL & HOSPITAL, DEPARTMENT OF PUBLIC WELFARE OF THE COMMONWEALTH OF PENNSYLVANIA, FRANK S. BEAL, Secretary of the Department of Public Welfare, STANLEY MEYERS, Deputy Secretary for Mental Retardation, Department of Public Welfare, HELENE WOHLGEMUTH, Former Secretary, Department of Public Welfare, ALDO COLAUTTI, Executive Deputy Secretary, Department of Public Welfare, WILBUR HOBBS, Deputy Secretary for Southeastern Region, Department of Public Welfare, RUSSELL RICE, JR., Commissioner of Mental Retardation for Southeastern Region, Department of Public Welfare, C. DUANE YOUNGBERG, Superintendent, Pennhurst State School & Hospital, ROBERT SMILOVITZ, Former Assistant Superintendent, Pennhurst State School & Hospital, JOSEPH FOSTER, Assistant Superintendent, Pennhurst State School & Hospital, MARGARET GREEN, BETTY UPHOLD, ALICE BARTON, P. E. KLICK, DR. PAROCCA, HELEN FRANCIS, employees and agent of Pennhurst State School & Hospital, JOHN DOCTOR, JAMES NURSE, JANE AIDE, JILL THERAPIST, RICHARD ROE, JANE DOE, unknown and unnamed staff, employees and agents of Pennhurst State School & Hospital, each individual Defendant sued individually and in his or her official capacity, GEORGE METZGER, JOSEPH CATANIA, and ROGER BOWERS, Commissioners for Bucks County, ROBERT STREBL, EARL BAKER, and LEO MCDERMOTT, Commissioners for Chester County, FAITH R. WHITTLESEY, CHARLES KEELER and WILLIAM SPINGLER, Commissioners for Delaware County, A. RUSSELL PARKHOUSE, FRANK W. JENKINS and LAWRENCE H. CURRY, Commissioners for Montgomery County, MAYOR FRANK L. RIZZO and THE CITY COUN-

CIL OF PHILADEPHIA, as Authorities for Philadelphia County, PETER BODENHEIMBER, Mental Health/Mental Retardation Administrator for Bucks County, WILLIAM A. MCKENDRY, Mental Health/Mental Retardation Administrator for Chester County, P. PAUL BURRICHTER, Mental Health/Mental Retardation Administrator for Delaware County, HERMANN A. ROETHER, Mental Health/Mental Retardation Administrator for Montgomery County, and LEON SOFFER, Mental Health/Mental Retardation Administrator for Philadelphia County, Commonwealth of Pennsylvania Defendants Pennhurst State School & Hospital, Department of Public Welfare of the Commonwealth of Pennsylvania, Frank S. Beal, Stanley Meyers, Helene Wohlgemuth, Aldo Colautti, Wilbur Hobbs, Russell Rice, Jr., C. Duane Youngberg, Robert Smilovitz, Joseph Foster, Margaret Green, Betty Uphold, Alice Barton, P. E. Klick, Dr. Parocca, and Helen Francis,

Appellants in No. 78-1490

GEORGE METZGER, JOSEPH CATANIA, and ROGER BOWERS, Commissioners for Bucks County, and PETER BODENHEIMBER, Mental Health/Mental Retardation Administrator for Bucks County, ROBERT G. STREBL, EARL M. BAKER, and LEO MCDERMOTT, Commissioners for Chester County, and WILLIAM A. MCKENDRY, Mental Health/Mental Retardation Administrator for Chester County, FAITH RYAN WHITTLESEY, CHARLES C. KELLER, and WILLIAM A. SPINGLER, Commissioners for Delaware County, and P. PAUL BURRICHTER, Mental Health/Mental Retardation Administrator for Delaware County, and A. RUSSELL PARKHOUSE, FRANK W. JENKINS, and LAWRENCE H. CURRY, Commissioners for Montgomery County, and HERMANN A. ROETHER, Mental Health/Mental Retardation Administrator for Montgomery County,

Appellants in No. 78-1564

MAYOR FRANK L. RIZZO, THE CITY COUNCIL OF PHILADELPHIA, and LEON SOFFER,
Appellants in No. 78-1602

On Appeal From the United States District Court
for the Eastern District of Pennsylvania

(D.C. Civil No. 74-1345)

Argued: January 9, 1979

Before: SEITZ, *Chief Judge*, GIBBONS and HIGGINBOTHAM, *Circuit Judges*

Reargued en banc September 6, 1979
Before: SEITZ, *Chief Judge*, ALDISERT, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*

(Opinion Filed December 13, 1979)

OPINION OF THE COURT

GIBBONS, *Circuit Judge*:

This is an appeal from an order granting class action injunctive relief against the continued maintenance of Pennhurst State School and Hospital (Pennhurst), a facility for the care and training of persons suffering mental retardation. Located in Spring City, Pennsylvania, Pennhurst is operated under the direction of the

Pennsylvania Department of Public Welfare. The appellants are Pennhurst, its superintendent and various other officials of the Commonwealth of Pennsylvania responsible for the operation of Pennhurst (the Commonwealth defendants), and five counties in southeastern Pennsylvania from which mentally retarded persons are admitted to Pennhurst (the County defendants).[1] The appellees are the original and intervening plaintiffs, described more fully below. We affirm the trial court's finding of liability, and modify in part the court's decree.

I. PROCEEDINGS BELOW

The action commenced on May 30, 1974, when Terri Lee Halderman, a minor retarded resident of Pennhurst, for herself and all other Pennhurst residents, filed a complaint against the Commonwealth defendants. The complaint alleged that the residents, all of whom are mentally retarded, live in inhumane and dangerous conditions, are subjected to unnecessary physical restraints, are given unnecessary and dangerous medication, are consigned to lives of idleness because of lack of habilitative programs, and are subjected to numerous physical injuries resulting from a lack of adequate supervision. The complaint further charged that the regimen of Pennhurst caused Halderman and her class to deteriorate and regress emotionally, intellectually and physically. The conditions to which residents were subjected, she claimed, denied the class members due process and equal protection of the law, and inflicted on them cruel and unusual punishment. Halderman sought both injunctive relief against the conditions at Pennhurst and money damages for past injuries.

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[1] The Commonwealth defendants are appellants in No. 78-1490. Appellants in No. 78-1564 include Bucks, Chester, Delaware and Montgomery Counties. Philadelphia is appellant in No. 78-1602. In a related case, No. 78-1999, disposed of separately, Pennhurst Parents-Staff Association appeals from the denial of its motion to intervene.

In November 1974, the United States moved pursuant to Rule 24, Fed. R. Civ. P. 24, to intervene as a plaintiff. Its complaint sought injunctive relief against the Commonwealth defendants, citing the same conditions about which Halderman had complained. The Commonwealth defendants opposed intervention by the United States, but it was granted on January 17, 1975.[2]

On June 3, 1975, the Pennsylvania Association for Retarded Citizens (PARC) and several additional mentally retarded residents of Pennhurst moved to intervene. Like the United States, PARC and the additional individual plaintiffs sought only injunctive relief and proceeded only against the Commonwealth defendants.

Thereafter PARC and Halderman amended their complaints to seek relief, not only against the Commonwealth defendants, but also against the County defendants, who it was alleged, were responsible for the commitment of the mentally retarded to Pennhurst and also for the lack of local community facilities, access to which the class members were entitled. In the amended complaint the PARC and Halderman plaintiffs alleged violations of various rights arising under the eighth and fourteenth amendments of the United States Constitution; under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1976); under the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6001-6081 (1976); under the Pennsylvania Mental Health and Mental Retardation Act of 1966, Pa. Stat. Ann. tit. 50 §§ 4101-4704 (Purdon 1969). The district court, on November 29, 1976, denied motions to dismiss filed by the various defendants, and entered an order determining

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[2] The Commonwealth defendants thereafter sought a writ of mandamus from this court to compel the district court to dismiss the United States as a party. The writ was denied, and petitions for certiorari and for a stay of this court's order were denied by the Supreme Court. Beal v. Broderick, 431 U.S. 933 (1977).

that the action should be maintained as a class action, the class consisting of "all persons who as of May 30, 1974, and at any time subsequent, have been or may become residents of Pennhurst . . ." This included, besides current residents of the institution, all mentally retarded residents of the five counties of southeastern Pennsylvania who might in the future be placed in Pennhurst.

After extensive pretrial discovery, trial of the action commenced on April 18, 1977, and continued until June 13, 1977. On December 23, 1977, the trial judge made findings of fact and conclusions of law holding that the defendants were violating the rights of members of the mentally retarded class secured to them by section 504 of the Rehabilitation Act of 1973, by the Pennsylvania Mental Health and Mental Retardation Act of 1966, Pa. Stat. Ann. tit. 50, §§ 4201-4704 (Purdon 1969), by the due process and equal protection clauses of the fourteenth amendment, and by the eighth amendment prohibition against cruel and unusual punishment.[3] The court held that the mentally retarded have a federal statutory right to nondiscriminatory habilitation, a Pennsylvania statutory right to minimally adequate habilitation, and federal constitutional rights to nondiscriminatory habilitation, freedom from harm, and adequate treatment by the least restrictive means. Each of these rights was found to have been violated by the conditions of confinement at Pennhurst. Thereafter, on January 6, 1978, the court held a separate hearing on relief. The court requested that the parties meet and attempt to agree upon an order satisfactory to all the litigants. After meeting, the parties informed the court that they could not, and would not be able to, agree on an order. The court then asked the parties to submit separate proposed orders.

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[3] The district court's opinion is reported at 446 F. Supp. 1295.

On March 17, 1978, the court issued the order from which these appeals were taken.[4] The court ordered that Pennhurst eventually be closed and suitable community living arrangements and necessary support services provided for all Pennhurst residents (approximately 1200); that individualized program plans be developed for each resident with the participation of each class member or his next friend at the formulation and implementation stages; and that plans for the removal of Pennhurst residents to appropriate community based mental retardation programs, meeting individual needs and structured in the least restrictive, most integrated setting, be developed and submitted to the court. The order also provided for the appointment of a Special Master to supervise the planning and implementation of arrangements for placing Pennhurst residents elsewhere, and for the operation of Pennhurst until such placements were accomplished. It enjoined the County defendants from recommending future commitments of mentally retarded persons to Pennhurst, and forbade the Commonwealth defendants from placing additional persons there. It also established a "friend-advocate" program to represent the class members in monitoring the provision of community living arrangements. During the period of gradual phase-out of Pennhurst as a home for the mentally retarded, the Commonwealth defendants were ordered to take steps to prevent any recurrence of some of the more egregious abuses of residents which the court found to have occurred in the past. The order further empowered the Master to establish a plan to provide alternative employment for all Pennhurst employees. An application for a stay of the March 17, 1978 order was

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[4] The court entered judgment in favor of the defendants on the claim for money damages, and no appeal has been taken from that determination.

denied by the district court[5] and a panel of this court denied a stay pending appeal.

A panel of this court heard argument in the case on January 9, 1979. When no single opinion could command majority support, the case was set down for en banc disposition. Thereafter, renewed motions for a stay pending appeal were considered by the court en banc and on August 6, 1979 the court reserved judgment thereon, except that the order appealed from was "stayed to the extent that it shall not apply to transfers out of Pennhurt of any resident whose parents or guardian fails to sign a written consent to such transfer." In other respects, its implementation has gone forward pending appeal.

II. UNITED STATES INTERVENTION

The Commonwealth defendants, relying on *United States* v. *Solomon*, 563 F.2d 1121 (4th Cir. 1977), contended that the court erred in permitting the United States to intervene as a plaintiff. In *Solomon* the United States filed a complaint charging the State of Maryland with violating the rights of mentally retarded residents of the Rosewood State Hospital. The district court dismissed the action, holding that the United States lacked authority to bring it. The Fourth Circuit affirmed. In the instant case, equating intervention under Rule 24 with the original action in *Solomon*, the Commonwealth defendants urge that *Solomon* be followed and intervention by the United States disapproved. Of course, since the Halderman and PARC appellees defend the order appealed from on all the same grounds that the United States does, the resolution of the federal government's right to participate has no effect on the merits of the appeal. But its standing as an intervenor would determine

[5] Halderman v. Pennhurst State Sch. & Hospital, 451 F. Supp. 233 (E.D. Pa. 1978).

the standing of the United States to seek or oppose Supreme Court review. Thus it is appropriate that we address that question.

In *Solomon* the Fourth Circuit acknowledged the numerous federal statutes evidencing a federal interest in, concern for, and activity with respect to the mentally retarded.[6] It pointed out that no statute expressly authorized the United States to bring suit to challenge the alleged deprivation of the rights of the retarded. Reviewing and purporting to distinguish numerous cases sustaining the authority of the United States to sue in the absence of such express statutory authorization,[7] the court said:

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[6] These included §§ 1905(c) and (d) of Title XIX of the Social Security Act, 42 U.S.C. § 1396(c)(d) (1976); the Education of the Handicapped Act, 20 U.S.C. §§ 1401-1461 (1976); the Developmental Disabilities Services and Facilities Construction Act, 42 U.S.C. §§ 2661-2666 and 2670-2677c, as amended by the Developmentally Disabled Assistance and Bill of Rights Act, Pub. L. No. 94-103, 89 Stat. 496, 42 U.S.C. §§ 6001-6081 (1976); the surplus food program, 7 U.S.C. § 1431 (1976); and the school lunch program for institutionalized children, 42 U.S.C. § 1761 (1976).

[7] *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713 (1971) (suit to enjoin publication of the Pentagon Papers); *In re* Debs, 158 U.S. 564 (1895) (suit to enjoin strike affecting interstate commerce); United States v. San Jacinto Tin Co., 125 U.S. 273 (1888) (suit to set aside patent to land procured by fraud); United States v. Bell Telephone Co., 128 U.S. 315 (1888) (suit to set aside invention patent obtained by fraud); United States v. Brand Jewelers, Inc., 318 F. Supp. 1293 (S.D.N.Y. 1970) (suit to enjoin systematic due process violations in collection of consumer credit obligations). Perhaps not surprisingly, the strongest resistance to the standing of the United States to sue in the absence of an express statutory authorization has arisen out of its efforts to enforce civil rights. As the *Solomon* court put it:

> Congressional concern with federal-state relations in the area of civil rights is sufficiently great that we are reluctant to sustain nonstatutory executive acts in all but the clearest case.

563 F.2d at 1129. *See also* United States v. School Dist. of Ferndale, 400 F. Supp. 1122 (E.D. Mich. 1975), *aff'd in part and remanded in part*, 577 F.2d 1339 (6th Cir. 1978); United States v. County School

> [W]e decline to hold that in the absence of specific authority the United States may sue in the instant case. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952)—the so-called "Steel Seizure Case"—is one of the reasons for our decision. It raised the question of whether the President had the authority to seize the nation's steel industry in an effort to prevent a crippling steel strike during the Korean War. Because the President had no statutory or constitutional authority to seize the mills, the Court held that the seizure was illegal and improper.
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> The case is important here because of the light that it sheds on the doctrine of separation of powers.

563 F.2d at 1128.

We do not find persuasive the *Solomon* court's analogy between President Truman's nonjudicial seizure of the steel mills by military force and a judicial proceeding to obtain injunctive relief enforcing legislative policies in aid of the mentally retarded. There is all the difference in the world for separation of powers purposes between a naked exercise of executive power and executive branch resort to the judicial branch for relief which Congress has not expressly prohibited. The President is, after all, charged with the responsibility to "take Care

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Bd., Prince George County, 221 F. Supp. 93 (E.D. Va. 1963); United States v. Biloxi Mun. School Dist., 219 F. Supp. 691 (S.D. Miss. 1963), and United States v. Madison County Bd. of Educ., 219 F. Supp. 60 (N.D. Ala. 1963), *both aff'd on other grounds*, 326 F.2d 237 (5th Cir.), *cert. denied*, 379 U.S. 929 (1964). We see in the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6001-6081 (1976) and § 504 more concern for the handicapped than for federal-state relations. Congress must be aware, from the annual reports of the Attorney General (1974, p. 7374; 1975, pp. 85-86; 1976, pp. 111-112; 1977, pp. 161-162), that a litigation program intended to strengthen the rights of mentally retarded persons is an ongoing Justice Department activity. It has not reacted negatively.

that the Laws be faithfully executed . . ." U.S. Const. art. II, § 3. When, in an effort to do so, he resorts to an Article III court under a recognized grant of federal jurisdiction such as 28 U.S.C. § 1345, and that court finds no legislative prohibition against that resort, the lawsuit cannot reasonably be seen as an invasion of the powers of Congress. Before relief can be given in such a suit, one branch, the executive, must seek it, while a second branch, the judiciary, must agree that it is authorized by the law promulgated by a third branch. If the judiciary has, in an individual case, misconstrued the law, Congress can, constitutional pronouncements aside, change the rule for the future. If Congress wishes to withhold from the executive branch the civil remedies available under the Federal Rules of Civil Procedure, it can by specific legislation say so. Thus, we find unconvincing the separation of powers argument invoked by the *Solomon* court to reject executive branch enforcement of federal law.[8]

In this case, however, we need not decide whether absent the Halderman action the United States could independently have sued. The suit was already pending. Moreover, in its constitutional dimensions the suit was expressly authorized by 42 U.S.C. § 1983. We hold that the initial plaintiffs have standing to enforce federal statutory claims as well. *See* p. 22 *infra*. Thus Congress has made the decision that someone could seek the injunctive relief in question. Intervention presented no danger that the federal executive would initiating [*sic*] a lawsuit that Congress somehow never intended. Intervention was sought pursuant to Rule 24, Fed. R. Civ. P. 24, and there was ample justification for permitting it. Under Rule 24(b)(2), a district court may allow intervention when an applicant's claim or defense and the main

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[8] *See* Gibbons, *The Interdependence of Legitimacy: An introduction to the Meaning of Separation of Powers*, 5 Seton Hall L. Rev. 435 (1974).

action have common questions of law or fact. Rule 24(b) makes specific provision for intervention by governmental agencies interested in statutes, regulations, or agreements relied upon by the parties in the action. Here, as noted below, there is extensive federal legislation directed toward the well-being of the mentally retarded. Several executive branch agencies, especially the Department of Health, Education and Welfare (HEW), have important responsibilities under that legislation. Large amounts of federal funds flow to Pennsylvania from the federal government, and the United States is vitally interested in the enforcement of the conditions in which those grants are made. One such condition is compliance with governing federal law. Had the United States sought to do so, it could have brought suit to enforce the conditions attached to its grants.[9] Clearly, then, the district court did not abuse its discretion in permitting intervention under Rule 24.

III. FACTUAL FINDINGS

Neither the Commonwealth nor the County defendants take serious issue with the court's findings of fact respecting the abominable conditions to which Pennhurst residents have been subjected. They do contend, however, that despite those findings there was no legal basis for the grant of any injunctive relief, and, alternatively, that the scope of the relief ordered was broader than was warranted by the facts or the law.

At the time of trial Pennhurst housed 1230 mentally retarded individuals, some of whom also suffered from physical disabilities. The residents are not mentally ill, have broken no laws, and are not a danger to others, although, in severe cases, some are unable to care for themselves. Mental retardation is an impairment in

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[9] *See* United States v. Solomon, 563 F.2d at 1129 (Butzner J., concurring), and cases cited.

learning capacity and adaptive behavior, and is not treatable, like mental illness, by means of drugs or psychotherapy. While the mentally retarded do suffer educational difficulties, the level of their functioning can be improved by individualized training.

Residents come to Pennhurst either because of a commitment order from a state court, or by a "voluntary" admission initiated by a parent or guardian. In either case, the admission is arranged through Base Service Units, operated by the County defendants pursuant to the Pennsylvania Mental Health and Mental Retardation Act.[10] The Base Service Units are responsible for evaluating the needs of retarded individuals and determining the appropriate habilitative services.

In addition to large residential institutions like Pennhurst, Pennsylvania operates smaller and less isolated programs referred to as Community Living Arrangements (CLAs). The latter programs reflect a recognition of the principles of normalization for the habilitation of the retarded.[11] Under normalization principles, retarded persons are treated as much as possible like nonretarded persons. The purpose of such treatment is remediation of the delayed learning process so as to develop maximum potential in self-help, language, per-

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[10] Pa. Stat. Ann. tit. 50 § 4301(d)(9) (Purdon 1969), states in relevant part:

> (d) . . . it shall be the duty of local authorities in cooperation with the department [of Public Welfare] to insure that the following mental health and mental retardation services are available:
>
> * * *
>
> (9) Unified procedures for intake for all county services and a central place providing referral services and information.

[11] For a description of the normalization principle in the care of the mentally retarded, *see* B. Nirje, The Normalization Principle, Changing Patterns in Residential Services for the Mentally Retarded, President's Committee on Mental Retardation, 231 (Rev. ed. 1976).

sonal, social, educational, vocational and recreational skills. These remediation efforts, the trial court found, are, in general, much more likely to succeed in smaller living units which are closer to and more reflective of the normal society. In large separate isolated institutions like Pennhurst, however, the retarded generally suffer apathy, stunted growth, and even regression in the skills referred to. The effective result is the imposition or facilitation of increased retardation. Such large institutions, the court also determined, are more expensive to operate than community based alternatives. Perhaps for those and other reasons it had been the current intention of the Department of Public Welfare to transfer residents from Pennhurst to community residential facilities, supported by specialized services, by some time in the early 1980's. In the five county area, 530 retarded persons already live in CLAs, including 186 former Pennhurst residents.

The district court also found that the environment at Pennhurst is not merely inconsistent with normalization principles, but is actually hazardous to residents. Because of the inadequacies in programming attributable to staff shortages, residents were found to have lost skills already learned. Organized programs of appropriate education and training were found to be inadequate or unavailable. Evaluations of resident progress do not meet minimum professional standards, and record keeping is inadequate.

Moreover, the Pennhurst environment was found to be unsanitary. There is often urine and excrement on the ward floors. Infectious diseases are common. Obnoxious odors and excessive noise permeate the institution. Most toilet areas do not have towels, soap or toilet paper. Injuries to residents by other residents or through self-abuse are common. Serious injuries inflicted by staff members, including sexual assaults, have occurred. Physical restraints, which may be physically harmful and

which have caused injuries and at least one death, are resorted to more frequently than appropriate because of shortages of staff. Dangerous psychotropic drugs are used for purposes of behavior control and staff convenience rather than for legitimate treatment needs. Such drug misuse produces lethargy, hypersensitivity to sunlight, inability to maintain gait, and other disabilities. Seclusion in solitary confinement has been used to punish aggressive behavior which might not have occurred if a proper regimen of training were available. Diet control is not possible because residents dine in large group eating areas without adequate staff supervision.

The federal government is a substantial partner in the Commonwealth's and Counties' provision of services generally available, although not always provided, to the mentally retarded. The Commonwealth Department of Welfare receives federal grants under both the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6001-6081 (1976), and the Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401-1461 (1976). The Commonwealth, in turn, makes funds available to the Counties for purposes of developing and maintaining their CLAs. Thus it is clear that there are county based programs open and available to the mentally retarded which receive federal financial assistance. The trial court found that the Counties have made an insufficient effort to provide community based services to the retarded.[12] The population of Pennhurst

[12] The trial court found that because the Commonwealth has chosen to pay all of Pennhurst's costs not federally funded, while requiring the Counties to pay 10% of the cost of some community based services, the Counties have a financial incentive to send retarded residents to Pennhurst rather than attempting habilitation within the community, 446 F. Supp. at 1312. *See* Record, Vol. 30, at 12.23 (testimony of Ms. E. A. Ballard). The County defendants urge that the finding that they have such a financial incentive is clearly erroneous. We need not resolve that question, since the basis on which we decide the legal issues is not dependent upon the motive of the Counties.

has thus remained high, effectively precluding the residents from taking advantage not only of federally funded programs expressly intended for the care of the retarded, but also of various other federally funded facilities such as education and transportation.

The court held that the isolation at Pennhurst is attributable, across the board, to state action. It found that about half of the Pennhurst residents had been committed there by order of a Pennsylvania court, while the other half had been admitted upon application of a parent or guardian. Although the latter group of residents are referred to in some of the briefs as voluntary admittees, theoretically free to leave when of age, the court found that when a resident wishes to leave and the Pennhurst staff determines that there is no place for him in the community, or that he is not ready for community living, a petition for involuntary commitment is made. The court found, moreover, that many residents do not understand the available alternatives in institutionalization, or are physically unable to express an interest in leaving, or have no adequate alternative living arrangement. Thus the notion of voluntariness in admission and retention was found to be illusory.

IV. PREFERRED LEGAL BASES FOR RELIEF

Appellants, as we noted above, do not quarrel with the facts; they dispute only the legal significance of those facts. They reject both the court's conclusion that the mentally retarded have a legal right to treatment or habilitation and its conclusion that treatment or habilitation must be provided in the least restrictive environment. Moreover, even assuming that these rights exist, appellants challenge the court's injunctive order as overbroad. We consider in turn each of these objections.

The district court's determination that appellees have a right to treatment was predicated upon constitutional,

federal and state statutory grounds. The federal courts have long been directed to decide whether causes of action can be supported on statutory grounds before they adjudicate constitutional law issues.[13]

Moreover, while federal courts can interpret federal legislation definitively, subject only to Supreme Court review, their interpretation of a state statute arguably supporting the judgment might be rejected by the state's courts. The preferred order, therefore, is to turn first to the federal statutory issues. Thereafter, we will consider state statutory grounds for the trial court's decision.

V. THE RIGHT TO TREATMENT OR HABILITATION [14]

A. *Federal Statutory Law*

In their second amended complaint, appellees asserted a cause of action under the Developmentally Disabled Assistance and Bill of Rights Act, Pub. L. No. 94-103, 89 Stat. 486, *codified at* 42 U.S.C. §§ 6001-6081 (1976) [hereinafter "the Act"]. The trial court did not reach the question of defendants' possible liability under this statute. The parties have nevertheless supplied this court with detailed briefing on the statute. We are persuaded that the Act provides the mentally retarded with a right to treatment.

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[13] Hagans v. Lavine, 415 U.S. 528, 543 (1974); Siler v. Louisville & Nashville R.R. Co., 213 U.S. 175, 193 (1909).

[14] Throughout this section the terms "treatment" and "habilitation" will be used interchangeably. Strictly speaking, since mental retardation is not a curable disability, the term "treatment" is inappropriate. Rather, "habilitation," which refers to "that education, training and care required by retarded individuals to reach their maximum development," 446 F. Supp. at 1298, is the more appropriate term. Nevertheless, because the relevant statutory and constitutional sources typically apply both to the mentally ill—who can be treated—and to the mentally retarded, who can only be educated, trained and cared for, we will employ both words interchangeably.

The Act was passed in 1975 as an amendment to the Developmental Disabilities Services and Facilities Construction Act. It established particular rights and benefits for the developmentally disabled, a class of persons which included the mentally retarded. 42 U.S.C. § 6001 (7) (A) (i). Among those was a right to the least restrictive environment, about which we will have more to say in Section VI A below. In addition, however, the Act expressly provided that the developmentally disabled have a right to treatment or habilitation. In the so-called Bill of Rights section, 42 U.S.C. § 6010, Congress made plain its intention to establish a right to treatment.[15]

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[15] § 6010. Congressional findings respecting rights of developmentally disabled.

Congress makes the following findings respecting the rights of persons with developmental disabilities:

(1) Persons with developmental disabilities have a right to appropritae treatment, services, and habilitation for such disabilities.

(2) The treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of the person and should be provided in the setting that is least restrictive of the person's personal liberty.

(3) The Federal Government and the States both have an obligation to assure that public funds are not provided to any institutional or other residential program for persons with developmental disabilities that—

(A) does not provide treatment, services, and habilitation which is appropriate to the needs of such persons; or

(B) does not meet the following minimum standards:

(i) Provision of a nourishing, well-balanced daily diet to the persons with developmental disabilities being served by the program.

(ii) Provision to such persons of appropriate and sufficient medical and dental services.

(iii) Prohibition of the use of physical restraint on such persons unless absolutely necessary and prohibition of the use of such restraint as a punishment or as a substitute for a habilitation program.

(iv) Prohibition on the excessive use of chemical restraints on such persons and the use of such re-

Congress found that "[p]ersons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities." 42 U.S.C. § 6010 (1). Moreover, both "[t]he Federal Government and the States . . . have an obligation to assure that public funds are not provided to any institutional or other residential program for persons with developmental disabilities that—(A) does not provide treatment, services, and habilitation which is appropriate to the needs of such persons . . ." 42 U.S.C. § 6010(3)(A). It is hard to see how Congress could have been any more precise

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straints as punishment or as a substitute for a habilitation program or in quantities that interfere with services, treatment, or habilitation for such persons.

(v) Permission for close relatives of such persons to visit them at reasonable hours without prior notice.

(vi) Compliance with adequate fire and safety standards as may be promulgated by the Secretary.

(4) All programs for persons with developmental disabilities should meet standards which are designed to assure the most favorable possible outcome for those served, and—

(A) in the case of residential programs serving persons in need of comprehensive health-related, habilitative, or rehabilitative services, which are at least equivalent to those standards applicable to intermediate care facilities for the mentally retarded promulgated in regulations of the Secretary on January 17, 1974 (39 Fed. Reg. pt. II), as appropriate when taking into account the size of the institutions and the service delivery arrangements of the facilities of the programs;

(B) in the case of other residential programs for persons with developmental disabilities, which assure that care is appropriate to the needs of the persons being served by such programs, assure that the persons admitted to facilities of such programs are persons whose needs can be met through services provided by such facilities, and assure that the facilities under such programs provide for the humane care of the residents of the facilities, are sanitary, and protect their rights; and

(C) in the case of nonresidential programs, which assure the care provided by such programs is appropriate to the persons served by the programs.

in revealing its intention to confer a right to treatment or habilitation.

Another section of the Act reaffirms the right to treatment. Section 6063 provides that any state which wishes to take advantage of the subchapter must submit a plan to the Secretary of HEW. That plan must contain a program designed, *inter alia*, "to improve the quality of care and the state of surroundings of persons for whom institutional care is appropriate . . ." 42 U.S.C. § 6063(b)(20)(B). While this section was deleted in the 1978 revision of the Act, it did apply until that date and retains legal significance for purposes of this litigation. Moreover, the revised statute contains a section requiring states to conform their plans to the dictates of the Bill of Rights provision, section 6010. *See* 42 U.S.C. § 6063(b)(5)(C) (Supp. 1979).

The legislative history of Pub. L. No. 94-103 also supports the recognition of a statutory right to treatment for the mentally retarded. Congressman Carter, in introducing H.R. 4005 (later enacted as Pub. L. No. 94-103) in the House, stated that among its many purposes "[t]his legislation . . . directs that States should devote attention to improving the facilities and surroundings of institutions where people have been appropriately institutionalized." 121 Cong. Rec. 9976 (1975). The bill was introduced in the Senate as S. 462. 121 Cong. Rec. 16,470. Senator Stafford, discussing the purpose of Title II—the Bill of Rights—stated "Title II was added to the bill to assist in the protection of the rights guaranteed under our Constitution for those individuals that will require institutionalization . . ." *Id.* at 16,516. Senator Javits added that "Congress should reaffirm its belief in equal rights for all citizens—including the developmentally disabled. Congress should provide the leadership to change the tragic warehousing of human beings that has been the product of insensitive Federal

support of facilities providing inhumane care and treatment of the mentally retarded." *Id.* at 16,519. Senator Cranston observed that while the bill endorsed deinstitutionalization, it "recognize[d] that the need for some long-term residential programs will remain. The bill specifically provides that where institutional programs are appropriate, adequate support should be planned for them so that necessary treatment and habilitation programs can be given residential patients to develop their full potential." *Id.* at 16,520. Senator Schweiker described one of the requirements of the proposed legislative Bill of Rights as "[h]umane care, treatment, rehabilitation, and protection in residential facilities . . ." *Id.* at 16,522.

The bill went to conference, in part because the Senante bill contained an expanded version of Title II—specifying in great detail the standards for appropriate care—with which the House did not concur. The Conference Committee compromised on details, and produced the more general, yet equally forceful Bill of Rights provisions, now codified in section 6010. A right to treatment was, as we noted above, specifically proclaimed. Thus, the Conference Report for the bill states that "the developmentally disabled have a right to appropriate treatment, services and habilitation . . ." H.R. Conf. Rep. No. 94-473, 94th Cong., 1st Sess. 42 (1975); U.S. Code Cong. & Ad. News 943, 961. In addition, Senators Javits, Schweiker and Williams, in approving the Conference Report, all called attention to the critical role of the right to treatment. 121 Cong. Rec. 29,820-21. We therefore hold that the Developmentally Disabled Assistance and Bill of Rights Act grants to the mentally retarded a right to treatment and habilitation.

We further hold that retarded persons have a private right of action under the Act. To date, only one other court has considered whether private litigants may en-

force the rights granted under the Act. In *Naughton* v. *Bevilacqua*, 458 F. Supp. 610 (D.R.I. 1978), Judge Pettine concluded that there was a private right of action. Plaintiffs in *Naughton* were a mentally retarded, schizophrenic patient and his father. They brought suit for injunctive relief and damages, alleging that the child had sustained injuries as a result of drugs administered to him in a Rhode Island institution. Among their several causes of action, plaintiffs asserted a claim under 42 U.S.C. §§ 6001-6081.

The court, reviewing the statute, concluded that it intended to convey a private right of action. Judge Pettine offered several arguments supporting his view of Congressional intent. First, he noted, section 6010, the Bill of Rights provision, has two sections: the first "declares the right to appropriate treatment"; the second "provides that federal funds are available only to programs that meet certain basic minimum standards and offer 'appropriate' treatment." 458 F. Supp. at 616. "This dichotomy in sec. 6010," the court reasoned, "suggests that denial of funds is not the only mechanism to enforce the declared statutory rights." *Id.* In addition, the court noted that the Conference Report expressly states that " 'this right [to receive appropriate treatment] should be protected and assured by the Congress and the court.' " *Id.* (quoting [1975] U.S. Code Cong. & Ad. News 961). Furthermore, participating states are required under the Act "to establish an independent agency 'to protect and advocate the rights of persons with developmental disabilities, and . . . to pursue *legal*, administrative, and other appropriate remedies to insure the protection of the rights of such persons who are receiving treatment, services or habilitation within the State. . . .' " *Id.* (quoting 42 U.S.C. § 6012(a)). As the court observed, "[t]he enforcement of individual rights . . . cannot be achieved solely by withholding fed-

eral funds; not only is the Secretary incapable of investigating every violation, but the Secretary may quite properly be unwilling to withhold funds for a single violation. Thus, the advocacy agency and a private right of action are crucial to protect the rights secured by the Act." *Id.* Finding that the developmentally disabled were the "especial benefi[ciaries]" of the Act, that private suits would effectuate the policies of the statute, and that they would not infringe traditional state prerogatives, the *Naughton* court concluded that there was a private right of action under 42 U.S.C. §§ 6001-6081.

We find the *Naughton* court's analysis persuasive. A private right of action eminently satisfies the standards articulated in *Cort* v. *Ash*, 422 U.S. 66, 78 (1975).[16] As developmentally disabled persons, the mentally retarded undoubtedly qualify as "especial benefi[ciaries]" of the section 6010 grant of a right to treatment. In addition, the Conference Report recognized the desirability of enforcement of the Act, in part, by the courts. Moreover, a private right of action would surely further the purposes of the Act. By permitting private suits, courts would facilitate improvements in the delivery of services to the disabled without forcing the federal gov-

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[16] *Cort* v. *Ash* set forth four relevant factors to be considered in determining whether a private remedy is implicit in a statute: whether the plaintiffs are especial beneficiaries of the statute, whether there is any indication of legislative intent to create a private remedy, whether a private remedy would further the policies of the statute, and finally whether the cause of action is one traditionally relegated to the states. *See* Cannon v. Univ. of Chicago, 47 U.S.L.W. 4549 (May 14, 1970) (implying private right of action under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1976), a civil rights statute); Note, *Implied Rights of Action to Enforce Civil Rights: The Case for a Sympathetic View*, 87 Yale L.J. 1378 (1978). *Cf. Touche Ross & Co.* v. *Redington*, 47 U.S.L.W. 4732 (U.S. June 18, 1979) (refusing to imply private action for damages under § 17(a) of the Securities and Exchange Act of 1934, clearly not a civil rights statute).

ernment to resort to the drastic remedy of a cut-off of funds.

It may be argued, however, that while the first three *Cort* v. *Ash* criteria are satisfied, the implication of a private right of action would infringe basic state prerogatives, and transgress the bounds of federal lawmaking competence, inasmuch as mental health policies have always been within the states' traditional police power authority. We are unpersuaded by that argument. While providing for the health and well-being of the citizenry is surely a legitimate state function, Congress's recognition of a right to treatment in section 6010 is not a simple displacement of that admitedly basic state concern.

In *Ingraham* v. *Wright*, 430 U.S. 651, 673 (1977), the Supreme Court said that among the liberties protected by the fourteenth amendment is "a right to be free from and to obtain judicial relief for unjustified intrusions on personal security." Section 5 of the fourteenth amendment vests Congress with authority "to enforce by appropriate legislation, the provisions of this article." In Section 6010, Congress has legislated with respect to the state intrusions on personal security of the developmentally disabled.[17] Thus, in providing specific guarantees for a particular affected group, Congress' action is consistent with the Supreme Court's recognition

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[17] That Congress intended in §§ 6001-6081 to enforce recognized constitutional rights is amply borne out by the legislative history of the Act. *See* 121 Cong. Rec. 16,516 (1975) (remarks of Sen. Stafford). Moreover, Senator Javits, speaking in support of the measure, cited Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972); 344 F. Supp. 373 (M.D. Ala. 1972), *enforcing*, 325 F. Supp. 781 (M.D. Ala. 1971), *affirmed in relevant part, remanded in part, and decision reserved in part*, Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (Constitution guarantees persons civilly committed to state mental institutions a right to treatment and granting relief does not invade exclusive province of state legislature), as an articulation of "constitutionally required minimum standards for the care and treatment of mentally retarded patients." *Id. at 16,519.*

of the broad underlying right protected against impairment by the state through the fourteenth amendment. Section 6010 does not go beyond what has been judicially declared to be the limits of the fourteenth amendment but clearly is within those bounds.[18] Since the rights described in section 6010 are specified pursuant to section 5 of the fourteenth amendment, implication of a private cause of action from that statute rests upon the same constitutional footing. Thus we are not dealing with the implication of a private cause of action from a congressional enactment justified only by the spending power of the federal government, and we need not address the question whether such a statute could ever provide the predicate for private substantive rights. As the Supreme Court acknowledged in another context, Congress may, under section 5, establish certain restrictions that might otherwise implicate the prerogatives of the states.[19]

We also note that any suggestion that private enforcement of the Act usurps basic State concerns, is vitiated by the structure of the Act itself. For example, section 6063(b)(20)(B), which until 1978 required states to produce a plan providing for improved quality of care, was applicable to all those states "desiring to take advantage of this subchapter." 42 U.S.C. § 6063(a). Congress thus invoked its spending clause powers to condition the grant of federal monies on the provision by the states of adequate care. Pennsylvania has accepted fed-

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[18] *Cf.* Oregon v. Mitchell, 400 U.S. 112 (1970); Katzenbach v. Morgan, 384 U.S. 641, 658 (1966) (§ 4(e) of Voting Rights Act of 1965 is proper exercise of congressional powers under § 5 of fourteenth amendment). *See generally Cox, Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 Harv. L. Rev. 91 (1966).

[19] *See* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); Usery v. Allegheny County Inst. Dist., 544 F.2d 148, 155 (3d Cir. 1976), *cert. denied*, 430 U.S. 946 (1977); *cf.* National League of Cities v. Usery, 426 U.S. 833 (1976).

eral funds provided pursuant to the Act.[20] Whatever argument it might otherwise have had were it faced with an unexpected set of federal obligations is refuted by its obvious willingness to accept the benefits of the Act.[21]

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[20] *See* Commw. of Pa., Governor's Executive Budget 1979-80 at 638. We need not decide whether the obligations of § 6010 apply even to those states which do not accept federal funds under the Act. As to those states, this spending clause analysis would not apply. For the reasons elaborated at p. 25, *supra*, and p. 27 n.21 *infra*, we doubt that the concerns for state autonomy—indicated in *National League of Cities*—would prevail over a congressional announcement of fourteenth amendment policy. But we need not address that issue here. It is sufficient for our purposes to note that Pennsylvania has accepted federal funds and has thus consented to federally mandated standards for the treatment and habilitation of the developmentally disabled.

[21] *Cf. Developments in the Law—Zoning*, 91 Harv. L. Rev. 1427, 1617 (1978) ("nothing in *National League of Cities* or in related principles of federalism would prevent Congress from using the spending power to require that states receiving federal funds for the development and administration of land use programs abide by federal specifications"). For these same reasons we would reject, were it made, any contention that §§ 6001-6081 are unconstitutional under *National League of Cities*. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), recognizes that *National League of Cities* is inapplicable to legislation promulgated pursuant to § 5 of the fourteenth amendment. 427 U.S. at 453-56. This court reached the same conclusion with respect to the Equal Pay Act. Usery v. Allegheny County Inst. Dist., 544 F.2d 148 (3d Cir. 1976) *cert. denied*, 430 U.S. 946 (1977). Moreover, we note that the Supreme Court itself has chosen to read the state reserved powers language in *National League of Cities* narrowly. In City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978), the Court held that cities and subdivisions of a state that engage in anticompetitive practices without authorization are subject to federal antitrust liability. The *Lafayette* Court paid scant attention to *National League of Cities*, thus suggesting that even under the commerce clause federal statutes may be enforced against the states. *See* 435 U.S. at 423-24 (Burger, C.J., concurring in Part I of the opinion and in the judgment) ("[t]he *National League of Cities* opinion focused its delineation of the 'attributes of sovereignty'. . . on a determination as to whether the State's interest involved ' "functions essential to separate and independent existence." '. . . It should be evident, I would think, that the running of a business enterprise is not an integral operation in the area of traditional government functions."). (Quot-

Finally, we have recently decided that a private right of action exists for the enforcement of section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1976)—another statute designed to improve the lives of handicapped persons. *National Association for the Advancement of Colored People* v. *The Medical Center, Inc.*, 599 F.2d 1247, 1258-59 (3d Cir. 1979).[22] We did not feel, in that case, that the traditional police power duties of the states foreclosed a private right of action. In view of these considerations, then, we hold that appellees have standing to sue to enforce the Bill of Rights provisions of the Act.

One court, we note, has held that claims under the Act must be brought in state court. *United States* v. *Solomon*, 563 F.2d at 1125. The *Solomon* court acknowledged that the Conference Report on the Act stated that the right to treatment "should be protected and assured

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ing National League of Cities v. Usery, 426 U.S. at 845, quoting Coyle v. Oklahoma, 221 U.S. 559, 580 (1911)).

The author of this opinion notes that even assuming, arguendo, that the provision of habilitation *is* within the sphere of the states' autonomy, that does not end the matter; "[t]o determine whether the federal action is unconstitutional requires a balancing of the federal interests, on the one hand, against the degree of federal intrusion upon state autonomy on the other." *Developments in the Law—Zoning*, 91 Harv. L. Rev. 1427, 1613 n.159 (1978). *See National League of Cities*, 426 U.S. at 852-53 (distinguishing Fry v. United States, 421 U.S. 542 (1975), which upheld a temporary freeze on wages of state and municipal employees, in part on the ground that "[t]he enactment at issue there was occasioned by an extremely serious problem. . . ."); *id.* at 856 (Blackmun, J., concurring). Here, Congress has found that certain rights must be recognized in order that disabled persons realize their basic constitutional liberties. The balance, in my view, plainly favors the legislation.

[22] In Southeastern Community College v. Davis, 47 U.S.L.W. 4689, 4691 n.5 (June 11, 1979), the Supreme Court expressly avoided deciding whether there exists a private right of action under section 504. The Court went on, however, to reach the merits of the plaintiff's cause of action.

by the Congress and the courts." 563 F.2d at 1124. It held, however, that this language "manifestly refers to a state judicial forum and not to a federal judicial forum where the United States customarily sues." *Id.* at 1125.

With deference to the Fourth Circuit, we see nothing manifest in the Conference Report supporting that court's interpretation. If anything, the legislative history reflects a Congressional belief that States were not spending funds for the disabled effectively. The Developmentally Disabled Assistance and Bill of Rights Act sought to change the traditional spending habits of the states. It is most unlikely that Congress intended those changes to be enforceable only in state courts.[23] We would find it quite anomolous in the absence of a clear congressional expression to hold that a federal statute created a cause of action arising under federal law, but enforceable only in the state courts and not under 28 U.S.C. § 1331 (1976).

Accordingly, we hold that appellees have a federal statutory right to habilitation, that they may sue to enforce that right, and that such suit is properly lodged in federal court.

3. *State Law*

As an alternative ground for a right to adequate habilitation, appellees point to sections 101-704 of Pennsylvania's Mental Health and Mental Retardation Act of 1966 [hereinafter MH/MR Act of 1966], Pa. Stat. Anr. tit. 50, §§ 4101-4704 (Purdon 1969). The trial court accepted this contention, relying principally upon section 201 of the Act. That section, which establishes the re-

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[23] In Part II, p. 18 *supra*, we rejected the *Solomon* court's position that the United States was precluded from judicial enforcement of the Developmentally Disabled Assistance and Bill of Rights Act.

sponsibilities of the Department of Public Welfare, provides in pertinent part:

> The department shall have power, and its duty shall be:
>
> (1) To assure within the State the availability and equitable provision of adequate mental health and mental retardation services for all persons who need them . . .

Pa. Stat. Ann. tit. 50, § 4201. The court held that this section grants retarded persons an affirmative right to minimally adequate habilitation. 446 F. Supp. at 1322. Moreover, it noted, the County defendants share in this statutory duty to supply adequate treatment. *Id.* at 1322-23.

Section 201 refers to the State's "duty" to "assure" the "availability . . . of adequate mental health and mental retardation services for all persons who need them . . ." Pa. Stat. Ann. tit. 50, § 4201(1). That language is broad and determined: The obligation to provide services to the mentally handicapped on the basis of need [*sic*]. Had the Commonwealth intended to offer only confinement without more, it would hardly have spoken in terms of "adequate . . . services." *Id.*

Our reading of the statutory language is amply supported by the legislative history of the MH/MR Act of 1966. Speaking on behalf of the Act in the Pennsylvania Senate, Senator Pechan elaborated its fundamental habilitative purposes.

> The object of this legislation is to make it possible for every mentally disabled person to receive the kind of treatment he needs, when and where he needs it. It will make those services available to every citizen in every community which are now available only to a lucky few, in the more progres-

> sive communities. It will open more beds in the local general hospitals. It will make available the services of psychiatrists and psychologists, of psychiatric nurses and social workers, of specially trained occupational therapists, of speech and hearing therapists, of activities directors and of child care workers. It will supplement the benefits of therapy with daytime and evening programs of activity which will call back to reality the erring mind, which will re-create and strengthen the ties which bind one human being to another and make us comfortable in each others' company. It will provide productive activity for those who can work only in a sheltered situation, and for those who are able, it will prepare them to go back to the customary world of business and industry, or to go forth into it for the first time, as the case may be. For those in acute distress, service will be available twenty-four hours a day, and the violent will find protective care instead of the harsh custody of jail.

1966 Pa. Legis. J., 3d Spec. Sess. No. 33, 76 (Sept. 27, 1966). The Act, Senator Pechan declared "will [make] it . . . easy for a mentally disabled person to find the treatment he needs . . ." *Id.* Senator Sesler concurred, *id.* at 77, and added:

> When you realize that practically one out of ten of every Pennsylvanian has some problem in mental health, you will realize how vast the scope of this problem is. However, I think, we now have sketched in broad, general terms the framework of a program which can provide a continuum of services—out-patient, in-patient, diagnostic treatment, evaluation and research, a procedure of commitment under almost all conceivable types of circumstances.

Id.

Those few courts which have previously considered the MH/MR Act of 1966 have also gleaned from it a right to treatment for the mentally handicapped. In In re *Joyce Z.*, 123 Pitt. L. J. 181 (1975), the Common Pleas Court for Allegheny County held that a profoundly retarded child had, under section 201 of the Act, a right to treatment. 123 Pitt. L. J. at 187. The court quoted the relevant language of section 201 and declared, "These are brave words. We mean to see that the State, acting through the Department of Public Welfare, abides by them." *Id.* In view of the statutory right to treatment, the court held that Pennsylvania was obliged to provide casework services to the child, her parents, and her foster parents, together with financial assistance to meet the child's physical needs. *Id.* at 190. *Joyce Z.* establishes, as well, that the statutory right to treatment is under Pennsylvania law judicially enforceable in a private action.

To like effect was Chief Judge Lord's decision in *Eubanks* v. *Clarke*, 434 F. Supp. 1022 (E.D. Pa. 1977). There, relying in part on section 201 of the MH/MR Act of 1966, Judge Lord held that the plaintiff, an involuntarily committed schizophrenic, had a "state law right to treatment or release." 434 F. Supp. at 1027. Similarly, in *Hoolick* v. *Retreat State Hospital*, 24 Pa. Commw. Ct. 218, 354 A.2d 609 (1976), *aff'd* 476 Pa. 317, 382 A.2d 739 (1978), a Pennsylvania court described the MH/MR Act of 1966 as envisioning a "comprehensive program for the care, treatment and rehabilitation of mentally disabled and mentally retarded persons . . ." 24 Pa. Commw. Ct. at 220, 354 A.2d at 611.[24]

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[24] *See* County of Allegheny v. Commw. Dept. of Pub. Welfare, 33 Pa. Commw. Ct. 267, 269, 381 A.2d 1014, 1016 (1978) (squaring its own holding with the mandate of *Joyce Z.* and *Hoolick* which, in the court's view, required the availability of adequate mental retardation facilities). *Cf.* Doe v. Colautti, 592 F.2d 704, 711-12 (3d

Despite the apparent meaning of section 201, and the plain intentions of the state legislature,[25] several of the appellants object to the trial court's reliance on the MH/MR Act of 1966. The Commonwealth and the Counties contend that section 509(5) of the Act belies any duty on their part to provide treatment. Section 509(5) empowers the Department of Public Welfare to distribute grant monies to the Counties where sufficient funds have not been appropriated by the State.

> In the event that sufficient funds to pay the full amount of the grants to which the counties may be entitled under the provisions of this section have not been appropriated, to distribute State funds among the counties by a formula reasonably designed to achieve the objectives of this act, provided however, that in such event the counties' financial obligations under this act shall be reduced in accordance with the same formula and the counties shall be required to provide only those services for which sufficient funds are available.

Cir. 1979) (citing the MH/MR Act of 1966, and Pennsylvania's "allocation of an extraordinary large portion of its budget to the treatment of the mentally ill," as reasons to eschew creating new suspect classification for protection of mentally handicapped).

[25] While not expressly covering persons who are mentally retarded but not mentally ill, Pennsylvania's Mental Health Procedures Act, Pa. Stat. Ann. tit. 50, §§ 7101-7503 (Purdon) (Supp. 1979) promulgated in 1976, also reflects the state's recognition of a need for treatment. Section 102 of the Act provides, in pertinent part:

> § 7102. Statement of policy
>
> It is the policy of the Commonwealth of Pennsylvania to seek to assure the availability of adequate treatment to persons who are mentally ill, and it is the purpose of this act to establish procedures whereby this policy can be effected. . . . Treatment on a voluntary basis shall be preferred to involuntary treatment; and in every case, the least restrictions consistent with adequate treatment shall be employed.

Pa. Stat. Ann. tit. 50, § 7102.

Pa. Stat. Ann. tit. 50, § 4509(5). The Commonwealth contends that since services to the retarded can be reduced in light of insufficient funding, there cannot be "an unconditional right to those services." Brief for Commonwealth Appellants at 31. The Counties, on the other hand, rely on this section in making their argument that any duty to provide treatment rests solely on the state, and not them. Brief for Suburban County Appellants at 24-25.

We reject these contentions. Section 509(5) hardly relieves the Commonwealth of its statutory duties under section 201. Section 509(5) delineates nothing more than the method by which insufficient funds are to be distributed. It states the apparent truism that where the state has failed to provide Counties with full funding, the Counties need not supply a constant level of services. This may, to be sure, imply that the right to treatment is not "unconditional." But no right is without some limitations. All that section 201 promises, and all that we hold, is that to the extent Pennsylvania maintains facilities for the mentally handicapped, those facilities must provide adequate treatment or habilitation.

Nor do we agree with the Counties that section 509(5) absolves them of any duty to provide treatment. The MH/MR Act of 1966 contemplated a joint venture between the Commonwealth and its subdivisions, the Counties, in the provision of services to the mentally handicapped. As Senator Sesler stated, in supporting the Act:

> We want to make it clear, for the record, that we are giving this responsibility to our County Governments, and we are giving them a great deal of money. One of the amendments just adopted today has provided that the State will have to reimburse the counties for ninety per cent of the cost of the program. We are giving them a certain degree of freedom. However, we must remind them

> that the counties had a program of control for taking care of the mentally ill, prior to 1937, when they failed to do an adequate job. It may be that they lacked the finances at that time, and that they lacked the public's support. However, today, I think that the public's support is there. I trust that the Commonwealth will be there with the adequate finances.
>
> . . .
>
> I hope that we can focus attention on the local level, because if there was ever an example of a cooperative effort, which involves so many citizens and private groups as this legislation, I do not know what it is. We are going to give it control down on the local level; we are giving it a flexible degree of control. So, I am saying today—at least, I, speaking for myself—that we are charging County Governments with this tremendous responsibility. We hope that they will take these words to heart . . . .

1966 P. Legis. J., 3d Spec. Sess.—No. 33,77 (Sept. 27, 1966). Section 509(5) in no way undercuts the intended partnership of the Counties and the Commonwealth.

The Counties contend, however, that while they may have *some* responsibilities under the Act to provide habilitation to the retarded, those responsibilities are exhaustively specified in section 301(d), and no other duties —such as habilitation at institutions or community living arrangements—can be imposed upon them.[26] We

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[26] Section 301(d) of the Act provides:

> Subject to the provisions of sections 508 and 509(5) it shall be the duty of local authorities in cooperation with the department to insure that the following mental health and mental retardation services are available:
>
> (1) Short term inpatient services other than those provided by the State.

[Footnote continued on page 36a]

reject this suggestion. It is true that section 301(d) sets forth specific duties for the Counties. Nevertheless, the Counties mandate under the Act is much broader. Section 301(a), for example, states, in pertinent part:

> The local authorities of each county separately or in concert with another county or counties, as the secretary may approve, shall establish a county mental health and mental retardation program for the prevention of mental disability, and for the diagnosis, care, treatment, rehabilitation and detention of the mentally disabled and shall have power to make appropriations for such purposes.

Pa. Stat. Ann. tit. 50, § 4301(a). This section directs that local authorities establish a "mental health and mental retardation program for the . . . treatment, rehabilitation and detention of the mentally disabled . . ." *Id.* Thus, although section 4301(d) specifies certain facilities for which the Counties will be principally responsible, the Act as a whole contemplates County participation in all facets of the state's provision of services.

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[26] [Continued]

(2) Outpatient services.

(3) Partial hospitalization services.

(4) Emergency services twenty-four hours per day which shall be provided by, or available within at least one of the types of services specified heretofore in this paragraph.

(5) Consultation and education services to professional personnel and community agencies.

(6) Aftercare services for persons released from State and County facilities.

(7) Specialized rehabilitative and training services including sheltered workshops.

(8) Interim care of mentally retarded persons who have been removed from their homes and who having been accepted, are awaiting admission to a State operated facility.

(9) Unified procedures for intake for all county services and a central place providing referral services and information. (Footnote omitted) Pa. Stat. Ann. tit. 50, § 4301(d).

Indeed, in the case of Pennhurst itself, the Counties have joined inextricably in the state's provision—or lack of provision—of treatment. As we noted in Part III above, the Counties arrange for admission to Pennhurst through their operation of Base Service Units. Often, the district court found, the County Base Service Units fail to investigate alternatives to institutional placements, thereby consigning the mentally retarded to inadequate living conditions. 446 F. Supp. at 1313. Having thus participated for so long in the institutional practices at Pennhurst, the Counties cannot at this late date escape—by pointing the finger of responsibility elsewhere—the statutory duty to provide adequate habilitation.

Accordingly, we hold that the appellees have a state statutory right to habilitation, that they may sue to enforce that right, and that a federal court has pendent jurisdiction to enforce that right which was properly exercised in this instance.

VI. THE RIGHT TO THE LEAST RESTRICTIVE ENVIRONMENT

Having concluded that appellees have a right to treatment, we turn to a consideration of the setting in which that treatment must be provided. Plaintiffs contend that the state is obliged to provide habilitation in an environment that infringes least on the personal liberties of the mentally retarded. The trial court agreed, predicating the decision exclusively upon constitutional grounds. The court reasoned that because "[a]ll admissions to state facilities . . . entail an infringement on fundamental rights and freedom . . . [,] due process demands that if a state undertakes the habilitation of a retarded person, it must do so in the least restrictive setting consistent with that individual habilitative needs." 446 F. Supp. at 1319. While there is substantial caselaw support for the trial court's constitutional position,[27] our resolution of

[27] *See* note 38, *infra*.

the present controversy on statutory grounds obviates the necessity for consideration of this constitutional issue. Two federal statutes were relied upon in the district court as sources of a right to the least restrictive environment: The Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6001-6081 (1976), discussed at pp. 18-29 *supra*, and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1976).[28]

A. *The Developmentally Disabled Assistance and Bill of Rights Act.*

In Part V A above we addressed the origins and development of this statute. We noted there that the Act enunciates a right to treatment for the developmentally disabled. In addition to that right, however, the Act expresses a clear congressional preference for deinstitutionalization. Section 6010 states plainly that "the treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of the person and should be provided in the setting that is least resstrictive of the person's personal liberty." 42 U.S.C. § 6010(2). State plans were required, until 1978, to "contain a plan designed . . . to eliminate inappropriate placement in institutions of persons with developmental disabilities . . ." 42 U.S.C. § 6063(b)(20). Moreover, they were obliged to

> support the establishment of community programs as alternatives to institutionalization and support such programs which are designed to provide services for the care and habilitation of persons with devel-

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[28] As noted above, *supra*, the trial court did not reach the question of liability under § 6001 and while it found liability under § 504, the court did not rely expressly on that statute in developing a least restrictive alternative analysis. Since we also do not rely on § 504 nor on the Constitution for our holding we have of necessity, departed somewhat from the trial court's approach.

> opmental disabilities, and which utilize, to the maximum extent feasible, the resources and personnel in related community programs to assure full coordination with such programs and to assure the provision of appropriate supplemental health, educational, or social services for persons with developmental disabilities . . .

42 U.S.C. § 6063(b)(23). Finally, the plans were required to provide

> the maximum utilization of all available community resources including volunteers serving under the Domestic Volunteer Service Act of 1973 (Public Law 93-113) and other appropriate voluntary organizations except that volunteer services shall supplement, but shall not be in lieu of, services of paid employees . . .

42 U.S.C. § 6063(b)(26).

The legislative history of the Act supports the preference for deinstitutionalization. Introducing the bill in the House Congressman Carter stated:

> This bill encourages the States to adopt programs of deinstitutionalization. We, as a committee, are well aware that treatment of the developmentally disabled should be conducted in that person's community without unnecessarily institutionalizing him. Funds have been earmarked for this purpose.

121 Cong. Rec. 9976 (1975). Referring to another bill, Congressman Carter said its

> "main thrust . . . was to minimize the necessity for institutionalization. It has come to the attention of the committee that there needs to be particular atention paid to the same basic problem as it applies to the developmentally disabled. There seems to be a tendency in some areas to resort to inpatient treat-

> ment when other means of accomplishing the treatment might be possible. Having recognized that this misuse of facilities has taken place, it is now necessary that we take steps to review and correct the mistakes already made. The bill [H.R. 4005] requires that States spend a specified percentage of allotments to tackle the problem and see that those who have been inappropriately institutionalized be handled in some other manner.

Id. at 9977. Congressman Biaggi noted that "[t]he bill . . . recognizes the trend toward deinstitutionalization and propose[s] increased appropriations to carry out demonstration programs which will affect [sic] this goal." *Id.* at 9978. He added that "the cost of home health care can be . . . up to five times less expensive than care in a specialized facility." *Id.*

The House version of the bill passed by a vote of 398-5. *Id.* at 9981-82. As noted above, it was introduced in the Senate as S. 462. *Id.* at 16,470. Senator Williams, supporting the bill, described in detail the abuses of institutionalization to which the measure was addressed.

> Over the past few years, the horrifying conditions which exist in most of the public residential institutions for the mentally retarded and other developmentally disabled persons have provided shocking testimony to the inhuman way we care for such persons. The conditions at Willowbrook, at Partlow in Alabama, and at Rosewood in Maryland, and at many other institutions have shown beyond a shadow of a doubt that the treatment of these individuals is worse than [sic] all of us would like to admit.
>
> Steps to scale down many of these large custodial institutions have resulted in not-so-large institutions, often with not much improved care and with little follow-up. This has been true at Willowbrook: in

> 1965 and again in 1972, broad criticism has been levied at this institution; all indications point toward little change, unless substantial legal and advocacy pressure is forthcoming. While much can be said about the lack of available funds to improve conditions at these institutions, at some point this country must draw the line. The abuses are too commonplace to point at a single institution, or a single abuse and say that it is an anomaly. Over the last 2 years the Committee on Labor and Public Welfare has taken testimony or received reports of: Inappropriate admissions because of lack of community services, inappropriate and inhuman experimentation with residents, sterilizations and other operations performed for convenience of treatment, starvation and malnutrition, abuse and physical punishment, inadequate food and living conditions, and death.
>
> S. 462 provides a framework by which the constitutional rights of residents and other persons with developmental disabilities may be enforced.

Id. at 16,516-17. Senator Kennedy echoed these sentiments.

> Last year in testimony on this legislation, Geraldo Rivera showed the committee portions of his documentary on Willowbrook, and if anyone needed convincing of the need for the establishment of institutional standards, that film provided it. This legislation provides for the establishment of such standards.

Id. at 16,517. So, too, did Senator Cranston, *id.* at 16,520 ("I believe one very clear basic goal has been enunciated in the legislation reported from committee. That is the need to move away from long-term institutionalization of individuals with developmental disabilities to the development of community-based programs utilizing all com-

munity resources related to treatment or habilitation of such individuals to provide comprehensive services in the home community."); Senator Schweiker, *id.* at 16,521 ("The last 5 years have seen a dramatic increase in public awareness of the needs of institutionalized mentally retarded and developmentally disabled persons. This has been highlighted by scandals in many institutions, by court cases, and by the efforts of the communications media. Testimony before the committee demonstrated that standards in institutions for the developmentally disabled are urgently needed and that the Federal Government should play a major role in improving the care and services provided to developmentally disabled citizens."); and Senator Beall, *id.* at 16,522 ("In addition, I would like to express my support of title II of this bill, which reflects the increasing concern of Congress and the public in general about persons who are institutionalized because they are developmentally disabled. Increased technological development, especially in regard to travel speeds, and the sociological stress that many of our citizens are experiencing, particularly in this time of economic strain and increased crime, evidence the sad fact that there will be an increased need for psychological care. Residential care outside the home is necessary in some instances, although I am glad to say that increased emphasis is being placed on similar community-based facilities rather than the larger State institutions. Title II assures those individuals who must be institutionalized of their civil and personal rights, and, at the same time, provides for the best possible care and services.")

The Senate substituted the text of S. 462 for the House bill, H.R. 4005, and passed it. *Id.* at 16,523. A conference was convened and as noted above, the Senate's expansive delineation of the standards for institutional and community care was dropped and a more general Bill of Rights (section 6010) was adopted. Nevertheless, the Congress was serious about the Bill of Rights. The Con-

ference Report noted the difference between the Senate and House versions of the Act, and explained the resulting compromise:

> *Statement of Purpose*
>
> The Senate amendment, but not the House bill, states the purpose of the bill of rights to be establishing standards to assure the humane care, treatment, habilitation and protection of mentally retarded and other developmentally disabled individuals who are served by residential and community facilities and agencies.
>
> The conference substitute contains a compromise which enumerates Congressional findings respecting the rights of persons with developmental disabilities. These include findings that the developmentally disabled have a right to appropriate treatment, services and habilitation; that such treatment, services and habilitation should be designed to maximize the developmental potential of the person and be provided *in the setting that is least restrictive to his personal liberty*; that the Federal government and the States have an obligation to assure that public funds are not provided in programs which do not provide appropriate treatment, services and habilitation or do not meet minimum standards respecting diet, medical and dental services, use of restraints, visiting hours and compliance with fire and safety codes; and that programs for the developmentally disabled should meet appropriate standards including standards adjusted for the size of the institutions which are at least comparable to those promulgated under title 19 of the Social Security Act. (Emphasis added).

H.R. Conf. Rep. No. 94-473, 41-42 (1975), [1975] U.S. Code Cong. & Ad. News 943, 961.

When the Conference Report was submitted to the Senate, the new version of Title II (the Bill of Rights) was specifically reprinted so as "to emphasize the importance of this title of the bill." 121 Cong. Rec. 29,819 (1975) (remarks of Sen. Stafford). Senators Javits, Schweiker, and Williams all called attention to the Bill of Rights in applauding the compromise measure. *Id.* at 29,820-21.

Yet, while it disfavored institutionalization, the Developmentally Disabled Assistance and Bill of Rights Act did not prohibit all institutions. Congressman Carter, introducing H.R. 4005, stated "[t]his legislation also directs that States should devote attention to improving the facilities and surroundings of institutions where people have been appropriately institutionalized." *Id.* at 9976. Senator Stafford reported that "Title II was added to the bill to assist in the protection of the rights guaranteed under our Constitution for those individuals that will require institutionalization . . ." *Id.* at 16,516. And Senator Cranston observed that "in encouraging the movement to community-based programs, I recognize that the need for some long-term residential programs will remain. The bill specifically provides that where institutional programs are appropriate, adequate support should be planned for them so that necessary treatment and habilitation programs can be given residential patients to develop their full potential." *Id.* at 16,520. These same points were reflected in the Conference Report. Explaining the Bill of Rights provisions, the Report stated:

> These rights are generally included in the conference substitute in recognition by the conferees that the developmentally disabled, particularly those who have the misfortune to require institutionalization, have a right to receive appropriate treatment for the conditions for which they are institutionalized, and that this right should be protected and assured by the Congress and the courts.

H.R. Conf. Rep. No. 94-473, 42 (1975), [1975] U.S. Code Cong. & Ad. News 943, 961.

The Act does not, therefore, articulate a *per se* rule prohibiting institutions. That was not how the Congress understood the right to the least restrictive alternative. Rather, it seems that Congress believed that, for some patients, institutionalization might be "appropriate." In those individual cases, probably comparatively rare, adequate habilitation could not be accomplished in any setting less restrictive than an institution and the need for such habilitation could thereby justify institutionalization.

It is argued, however, that because the Act, until 1978, required states to spend a specific minimum amount for deinstitutionalization, the states were free to use institutions as much as they chose so long as they spent the specified amounts on alternative facilities. According to this thesis, states might retain full or nearly full institutionalization even for those patients for whom institutionalization was not "appropriate." We do not accept this contention. The spending requirement was clearly intended to encourage the development of alternative facilities. Congress rightly believed that the states were doing too little to develop alternatives to institutions. The minimum expenditure requirement must not be confused with a maximum duty on the States' parts; to do so would substantially undermine the right articulated in section 6010 and the insistence on specific deinstitutionalization plans in section 6063.

We hold, therefore, that the Developmentally Disabled Assistance and Bill of Rights Act provides to mentally retarded persons the right to the least restrictive environment. For some patients, to be sure, the Act contemplates that institutionalization might be appropriate once adequate habilitation and living conditions are established.

The clear preference of the Act, however, is deinstitutionalization, and for the reasons set forth in Part V A(1), we have no doubt about Congressional power to impose the least restrictive alternative requirement upon the states for patients who do not require institutionalization for adequate habilitation.

B. *Section 504 of the Rehabilitation Act of 1973*

Appellees argue that section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1976), also reflects Congressional desire to discourage the institutionalization of the mentally handicapped.[29]

While its language is somewhat opaque, appellees argue that the illuminating legislative history of section 504 supports the view that Congress sought in that section to combat, to the extent appropriate, the isolation of the handicapped from the community—an isolation which it believed was ineluctably entailed by institutionalization.[30]

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[29] Section 504 provides

> No otherwise qualified handicapped individual in the United States, . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

29 U.S.C. § 794 (1976).

Section 504 is the final section of the Rehabilitation Act of 1973. Textually, section 504 parallels the language of section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976), and of section 901 of Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681 (1976). Its passage was the result of a long effort to obtain for the handicapped a civil rights act similar to section 601 and section 901.

[30] *See* 118 Cong. Rec. 525 (1972) (remarks of Sen. Humphrey) (anti-isolation purposes of proposed amendment to § 601, predecessor to § 504); H.R. 8395, 92d Cong., 2d Sess. (1972) (Rehabilitation Act of 1972, predecessor bill of Rehabilitation Act of 1973); 118 Cong. Rec. 32,280 (1972) (remarks of Sen. Cranston) (anti-discrimination and anti-isolation purposes of Act); *id.* at 32,310 (remarks of Sen. Humphrey) (same); *id.* at 35,163 (anti-discrimination provision accepted by House in conference); *id.* at 36,410

Thus section 504, appellees argue, provides an alternative statutory basis for enforcing the right to a least restrictive environment or that the legislative history of section 504 offers powerful corroboration for the deinstitutionalist purposes of the Developmentally Disabled Assistance and Bill of Rights Act. However, because we have found clear expression of a least restrictive alternative requirement in the Developmentally Disabled Assistance and Bill of Rights Act, and ample confirmation of that expression in its legislative history, we find it unnecessary to consider these arguments. One clear federal statute announces the governing rule, and one is enough. Thus we decline to consider section 504 issues on this appeal.

VII. RELIEF

We have thus far concluded that the mentally retarded patients at Pennhurst have federal and state protected rights to habilitation in the least restrictive environment. Moreover, it goes almost without saying that Pennhurst, as it was constituted and operated at the time of the lawsuit, was in flagrant violation of those rights. The conditions at Pennhurst were unsanitary, programming was nonexistent, enforced idleness was substituted for meaningful habilitation, physical and chemical restraints were wantonly applied, and overcrowding and understaffing were the prevailing institutional norms. Yet, appellants contend that even if they were properly found liable under federal and state law, the trial court nevertheless

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(remarks of Rep. Brademas) (opposing isolation of handicapped due to institutionalization); *id.* at 36,414 (remarks of Rep. Badillo) (same); *id.* at 37,203-04 (Rehabilitation Act of 1972 vetoed by Pres. Nixon). The bill was reintroduced as the Rehabilitation Act of 1973. S. 7, 93d Cong., 1st Sess. (1973), and section 504 was finally enacted as part of this Act, with its proponents again emphasizing anti-isolation principles. *See* 119 Cong. Rec. 5880 (1973) (remarks of Sen. Cranston); *id.* at 5887 (remarks of Sen. Javits); *id.* at 18,127 (remarks of Rep. Brademas); *id.* at 24,566 (remarks of Sen. Stafford).

erred in several respects in ordering the relief that it did. First, they argue, the court order violates the eleventh amendment insofar as its effectuation will require an allocation of funds from the state treasury. Second, they urge, the relief should not have been classwide since events have disclosed a material rupture within the affected class. Third, appellants protest the appointment of a special master as beyond the scope of Rule 53(b), Fed. R. Civ. P. 53(b). Finally, they contend, several specific portions of the court order are legally unsupportable. These include: the requirement that patients and/or their next friend participate in the structuring of relief and review of the plan; the requirement that certain local rules on physical and chemical restraints be implemented; the requirement that a "friend-advocate" system be established; the requirement that alternate employment for each Pennhurst employee be found; and the requirement that Pennhurst be closed entirely and community living arrangements established in its place. While most of these objections are insubstantial we do agree that the ordered relief is somewhat overbroad. Accordingly, the injunction will be modified in accordance with our discussion below.

A. *The Eleventh Amendment*

The Commonwealth defendants assail the decree as a violation of the eleventh amendment. They urge that although the decree is couched in terms of prospective injunctive relief, its effectuation will nevertheless require the expenditure of Commonwealth funds. This result, it is urged, is forbidden by *Edelman* v. *Jordan*, 415 U.S. 651 (1974). Yet *Edelman* specifically acknowledges the continued availability of prospective injunctive relief even though such relief realistically does impose financial burdens. 415 U.S. at 667-68. *See Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 459-60 (Stevens, J., concurring). All of the

relief ordered here is prospective. We have told the Commonwealth before that *Edelman* "quite explicitly left intact the authority of federal courts to enter prospective decrees having fiscal consequences to a state treasury as the necessary result of compliance." *Vecchione* v. *Wohlgemuth*, 558 F.2d 150, 158 (3d Cir.), *cert. denied*, 434 U.S. 943 (1977). We have not changed our minds on that question.

We note, in addition, that the Supreme Court has recently reaffirmed this position. In *Quern* v. *Jordan*, 440 U.S. 332 (1979), the Court held that it was not a violation of the eleventh amendment for a federal court to order state officials to send an explanatory notice to members of a class advising them that there are state administrative procedures available by which they may receive a determination of whether they are entitled to past welfare benefits. The mere fact that such notices might eventually lead to an expenditure of funds by the state did not alter the fact that the relief was "properly viewed as ancillary to the prospective relief already ordered by the court." 440 U.S. at 349.

We therefore reject appellants' eleventh amendment objections.

B. *Classwide Relief*

On April 13, 1978, a motion to intervene in order to protest the possible closing of Pennhurst was filed on behalf of the Pennhurst Parents-Staff Association and six Pennhurst residents. That motion, which was made after the Commonwealth and Philadelphia defendants had filed their notices of appeal, was denied, and the appeal from that denial is considered separately at No. 78-1999. In their appeal in this case, the Commonwealth defendants rely on that motion to intervene as evidence that the interests of the plaintiffs were adverse to one another, and thus that the trial court erred, first, in certifying the class, and second, in granting classwide relief. We

reject completely the first contention. The certification of the class for purposes of determining liability was entirely proper. Plainly, the violations of federal and state law which the trial court found and which we have affirmed, are violations affecting all of the plaintiffs, not simply those who wish a transfer from Pennhurst. At the liability stage, therefore, important questions of law were common to all members of the class. Thus, regardless of my subsequent disagreement among class members as to the appropriate relief, we can think of no persuasive reason to have fractionated the class at that early juncture. *See* Fed. R. Civ. P. 23(c)(4)(A) (permitting use of class action device for purposes of particular issues within lawsuit). As Judge Frankel observed in the context of class actions brought under Rule 23(b)(3), Fed. R. Civ. P. 23(b)(3):

> In the cases to which I refer, assertedly under (b)(3)—i.e., having both common issues and issues affecting separately the individual members of the class—district judges have apparently thought that all members of the class would have to be brought before the court—for discovery as well as trial—before there could be any judgment affecting the class as a whole. Insofar as this premise lurks in the cited cases, it would appear to be unwarranted. Take, for example, the simple model of the case by an alleged class of securities purchasers charging fraudulent representations. There are, supposedly, common questions as to the nature of the alleged representations, falsity, and materiality. If some or all such questions are decided against the plaintiff class, the complaint will be dismissed and, always assuming adequate representation of the class, there will be a judgment binding the class without requiring any but the representative members to have been before the court.

> On the other hand, if the plaintiff class prevails on the common questions, it will then—but only then —become necessary to try or settle or otherwise dispose of individual questions like reliance, damages, or the like. If the common questions have been aptly defined, there should be no need at an earlier stage to have all the individual class members before the court for discovery or any other purpose.

Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 47 (1967) (footnote omitted). *See also Developments in the Law—Class Actions*, 89 Harv. L. Rev. 1318, 1491-92 (1976). It was not abuse of the trial court's discretion to certify the class for purposes of determining liability.[31]

The Commonwealth contends, however, that because some members of the plaintiff class are opposed to the closing of Pennhurst, the class should at least have been decertified for purposes of relief. Thus, it argues that classwide relief infringes on the dissenting members' rights. As we indicate in more detail below, the trial court did err in promulgating a blanket order closing Pennhurst without sufficiently canvassing the needs of individual patients. Accordingly, inasmuch as we modify the court order appealed from, our opinion takes account of the differences within the class concerning relief. Nevertheless, we do not think that the implementation of the relief, as modified by our opinion, requires the decertification of the class. Two procedural alternatives, short of decertification, are available to the trial court on remand in implementing individuated relief.

First, the court can create subclasses within the plaintiff class pursuant to Rule 23(c)(4)(B). Through

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[31] *See* Paton v. La Prade, 524 F.2d 862, 875 (3d Cir. 1975); Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 245 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975).

this process, individual patients who wish to remain at Pennhurst may be represented at the implementation hearings. We suggested this approach in *Samuel* v. *University of Pittsburgh*, 538 F.2d 991 (3d Cir. 1976) (Clark, J.). There, we reversed a trial court decision decertifying a class at the relief stage. We stated that "even if there were managerial difficulties [in litigating the appropriate relief], some investigation into the possible usefulness of subclasses as suggested by Rule 23 (c) (4) (B) should have been undertaken before decertification was ordered." 538 F.2d at 996. *See also Nix* v. *Grand Lodge of Int'l Ass'n of Mach. & Aero. Workers*, 479 F.2d 382, 385 (5th Cir.), *cert. denied*, 414 U.S. 1024 (1973); *Developments in the Law—Class Actions*, 89 Harv. L. Rev. 1318, 1479-82 (1976).

Yet another means by which dissenting members may be represented at the relief stage is through intervention. *See id.* at 1482-85. We note in this connection that the trial court currently has under consideration a motion by the Pennhurst Parents-Staff Association—who purport to represent patients opposed to closing Pennhurst—to intervene at the relief stage.

Even should the trial court ultimately decline to pursue either of these two procedural alternatives to decertification, the interests of dissenting members will still be represented. As we suggested above, and as we will elaborate at greater length below, plaintiffs' right to habilitation in the least restrictive environment requires that they be given an individual opportunity to participate in the process by which their habilitation is chosen. Thus, whether they are represented as a group, through such procedural safeguards as subclasses or intervention, or whether they participate as individuals, class members who wish continued habilitation at Pennhurst will have a chance to state their position.

C. *The Use of a Master*

The court found that implementation of its order would be impossible without the assistance of a Special Master "with the power and duty to plan, organize, direct, supervise and monitor the implementation of this and any further Orders . . ." 446 F. Supp. at 1326. It directed the Commonwealth and County defendants to provide the Master with access to premises, records, documents, and residents, and to cooperate with him to the extent necessary to execute such orders. The Master was directed to prepare and present to the court for its approval various plans for the transfer of Pennhurst residents to CLAs and for the provision of services to the class members "in the least separate, most integrated, least restrictive community setting," taking into account available resources. *Id.* at 1326-27. The order also directed that the Master prepare a plan for the interim operation of Pennhurst pending its replacement by other living arrangements and services.

The appellants contend that appointment of a master was improper under Rule 53(b), Fed. R. Civ. P. 53(b). We disagree. It is abundantly clear that providing the 1200 Pennhurst residents with a right to habilitation in the least restrictive environment will be a complex and lengthy process, probably involving monitoring, dispute resolution, and development of detailed enforcement mechanisms. Were we to preclude the trial court from resorting to a master, we would help make self-fulfilling the frequently made prophecy that courts are institutionally incapable of remedying wholesale violations of legally protected rights. Masters have been used in a wide variety of remedial contexts. These include cases involving handicapped children,[32] as well as cases

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[32] *See, e.g.*, Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972); Pennsylvania Ass'n for Retarded Children (PARC) v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971); 343 F. Supp. 279 (E.D. Pa. 1972).

remedying various other statutory or constitutional violations.[33] Masters are peculiarly appropriate in the implementation of complex equitable decrees which require ongoing judicial supervision.[34]

Moreover, by use of a master, the judge can minimize his personal participation in the details of implementation without sacrificing direct control or efficacy.[35]

While they acknowledge that courts have frequently relied upon special masters, appellants nonetheless insist that the master appointed by the trial court in this case will have excessive powers. "The proper rule of a master in federal litigation," appellants urge, "is narrowly circumscribed." Brief for Commonwealth Appellant at 49. Specifically, it is urged, a master may only find facts. Since the lower court has already found the facts, any use of a master for implementation purposes intrudes excessively into the proper domain of local autonomy. *Id.* at 51-52.

This argument is unpersuasive. First, the Commonwealth is simply incorrect in asserting that the scope of a

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[33] *See, e.g.*, Chicago Hous. Auth. v. Austin, 511 F.2d 82 (7th Cir. 1975) (overseeing implementation in public housing discrimination case); Gautreux v. Chicago Hous. Auth., 384 F. Supp. 37 (N.D. Ill. 1974) (same); Hart v. Community Sch. Bd., 383 F. Supp. 699 (E.D.N.Y. 1974) *aff's* 512 F.2d 37 (2d Cir. 1975) (coordinating development of desegregation plan in housing and school discrimination case); Moore v. Leflore County Bd. of Election Comm'rs, 361 F. Supp. 603 (N.D. Miss. 1972) (formulating reapportionment plan); Gates v. Collier, 349 F. Supp. 881 (N.D. Miss. 1972) (implementing prison reform), *aff'd*, 501 F.2d 1291 (5th Cir. 1974); Knight v. Board of Educ., 48 F.R.D. 115 (E.D.N.Y. 1969) (conducting due process grievance hearings in schools).

[34] *See generally* Note, *Implementation Problems in Institutional Reform Litigation*, 91 Harv. L. Rev. 428 (1977); Note, *Monitors: A New Equitable Remedy?*, 70 Yale L.J. 103 (1960).

[35] Note, *Implementation Problems in Institutional Reform Litigation*, 91 Harv. L. Rev. 428, 451 (1977); Kaufman, *Masters in the Federal Courts: Rule* 53, 58 Colum. L. Rev. 452, 469 (1958).

master's duties is narrow. As one commentator has properly noted, "[m]asters may be delegated the authority to issue subpoenas, hear grievances, take sworn testimony, and make formal or binding recommendations, including contempt findings, to the court." Note, *Implementation Problems in Institutional Reform Litigation*, 91 Harv. L. Rev. 428, 451 (1977). In employment discrimination cases, for example, court-appointed administrators, who have the same powers as masters, have made frequent and successful use of rather wide-ranging powers. *See* Harris, *The Title VII Administrator: A Case Study in Judicial Flexibility*, 60 Cornell L. Rev. 53 (1974). Authorized to take all action necessary to implement the decree and to remedy breaches of compliance, these administrators have performed negotiating and investigatory functions, and have issued recommendations for future implementation. *Id. at* 55, 64. *See* Note, *Implementation Problems in Institutional Reform Litigation*, 91 Harv. L. Rev. 428, 452 (1977).

In this case, moreover, the court's resort to use of a master is particularly appropriate. After the decision on liability was announced, the appellants were afforded an opportunity to devise and present their own remedies for conditions at Pennhurst. They failed to do so. At that point, having received insufficient assistance from the officials directly involved, the court was faced with the choice of massive personal participation in devising a complex scheme for remedying the violations that were found, or of proceeding with the assistance of a master, whose functions would be supplementary to and supervisory over those of the Commonwealth and County defendants. We hold that the trial court chose correctly in ordering the appointment of a master. We are confident that the court will exercise appropriate supervision over the operations of the master in order to minimize the expenditure of funds in the administration of his responsibilities and the manner in which he dis-

charges his responsibilities under the degree; in particular, the manner in which individualized habilitation programs are developed for each class member. As we understand the role of the Master under the decree, he is to supervise all implementation efforts with the aid and assistance of all parties to the lawsuit. The defendants will thus have an opportunity to participate in the structuring of relief. Moreover, their underlying obligation to provide habilitation in the least restrictive environment is derived, in part, from a state statute and federal statutes under which Pennsylvania has received federal funds. These duties were known and consented to. These considerations, in our view, vitiate whatever complaint the Commonwealth might otherwise have that the court order somehow violates whatever principles of federalism are relevant. Brief for Appellant at 59-62.

D. *Specific Objections to the Court Order*

Appellants also contest certain specific portions of the court's decree. They object to paragraph 2, 446 F. Supp. at 1326, which entitles members of the class and their next friend to participate in the development and review of the plan. They protest that paragraph 13, *id.* at 1328, requiring that certain local rules on physical and chemical restraints be implemented, is inapplicable since (1) the rules were not in effect long enough to permit a finding that they were violated, and (2) the rules are not statutorily compelled. In addition, appellants contend that paragraph 6, *id.* at 1326-27, imposes on the state duties which have no legal source; these duties include the establishment of a friend-advocate system and the provision of alternative employment for each Pennhurst employee. Finally, appellants argue that the trial court should not have ordered that Pennhurst be entirely closed, particularly in view of the apparent desire of certain members of the class to remain at the institution once it is improved.

Criteria for evaluating the trial court's exercise of discretion in effecting a remedy are set forth in *Milliken* v. *Bradley*, 433 U.S. 267, 279-288 (1977) (*Milliken II*). There, the Court held that if an alleged injury is constitutionally (or presumably statutorily) cognizable, "the remedy does not 'exceed' the violation if the remedy is tailored to cure the ' "condition that offends the Constitution." ' " *Id.* at 282 (quoting *Milliken* v. *Bradley*, 418 U.S. 717, 738 (1974) (*Milliken I*)) (emphasis added by the *Milliken II* Court). In *Milliken II*, the Court affirmed a district court decision to order certain remedial reading, testing, and counseling services. These remedies, the Court concluded, were found by the trial court to be necessary to "cure" the "condition" of *de jure* segregation in Detroit. *Id.* at 288. The Supreme Court could find no reason to believe that the district court had abused its "broad and flexible equity powers" in reaching this determination. *Id.*

Under these liberal standards, we have no trouble upholding paragraphs 2 and 13 of the court order. In this case, the "condition" to be "cured" is the failure to provide the retarded with adequate habilitation in the least restrictive environment. Both paragraphs 2 and 13 are directly addressed to remedying this condition. Parental and patient participation in the design of alternative facilities is well-suited to redressing the violations of the rights of the retarded. So, too, are the restrictions imposed by the court against physical and chemical restraints.

In addition, we affirm that portion of paragraph G which establishes a friend-advocate system to monitor the continued availability of community services to the retarded. Not only will such a system help to effectuate the rights of the retarded but, by providing ongoing supervision of implementation efforts, it will reduce the need for judicial oversight.

The court's decree should be modified in two respects. First, we cannot agree with that portion of paragraph 6, requiring that alternative employment be provided to all Pennhurst employees. Even under the liberal standards of *Milliken I*, we do not see how this mandate is reasonably related to facilitating the right of the retarded to habilitation in the least restrictive environment. This section of the court's order must therefore be set aside.

Second, we cannot agree with the trial court that Pennhurst must be entirely closed. In so ruling, the court first noted that Pennhurst was not providing adequate habilitation at the time of the litigation, 446 F. Supp. at 1318. With that conclusion we obviously agree. But the court also held that Pennhurst could *never* provide adequate habilitation because of its very status as a large institution.

> [O]n the basis of this record we find that minimally adequate habilitation cannot be provided in an institution such as Pennhurst. As the Court has heretofore found, Pennhurst does not provide an atmosphere conducive to normalization which is so vital to the retarded if they are to be given the opportunity to acquire, maintain and improve their life skills. Pennhurst provides confinement and isolation, the antithesis of habilitation. We found that Pennhurst has produced regression and in many instances has destroyed life skills possessed by its retarded residents at the time of their admission. We are inclined to agree with the following comments of Mason & Menolascino, . . . (footnotes omitted):
>
> > Although *Wyatt* and *Welsh* are significant in their recognition of the principles of normalization and the developmental model for the factual foundation of their formulation of the constitutional right to habilitation, their ap-

> proach can be considered only the rudimentary beginning. The logic of normalization and the developmental model which *Wyatt* and *Welsh* recognized suggests full implementation of habilitation can only be achieved in a non-institutional setting. Institutions, by their very structure—a closed and segregated society founded on obsolete custodial models—can rarely normalize and habilitate the mentally retarded citizen to the extent of community programs created and modeled upon the normalization and developmental approach components of habilitation. Neither *Wyatt* nor *Welsh* fully implemented the right to habilitation in that they failed to challenge the very existence of the institution. Consequently, the two institutional characteristics most antithetical to the application of the normalization principle remain intact: segregation from the community and the total sheltering of retarded citizens in all spheres of their lives.

Id. (footnote omitted) (quoting Mason & Menolascino, *The Right to Treatment for Mentally Retarded Citizens: An Evolving Legal and Scientific Interface*, 10 Creighton L. Rev. 124, 156-57 (1976)). The court was thus apparently persuaded to the view, shared by many practitioners, that institutionization of any sort is a deterrent to adequate habilitation.[36]

It is probably true, as the trial court found, that in general institutions are less effective than community living arrangements in facilitating the right to habilitation in the least restrictive setting. There is ample testimony on the record indicating the shortcomings of insti-

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[36] *See, e.g.*, Burt, *Beyond the Right to Rehabilitation*, in *The Mentally Retarded Citizen and the Law* 418-36 (President's Committee on Mental Retardation 1976).

tutions as places for habilitation. *See, e.g.*, Record, vol. 1, at 96 (testimony of Dr. Roos); Record, vol. 4, at 73 (testimony of Mr. Lancaster-Gaye); Record, vol. 2, at 96 (testimony of Dr. Clements). Moreover, institutions would generally appear not to be the least restrictive environment in which to provide habilitation. *See* Record, vol. 4, at 79 (testimony of Mr. Lancaster-Gaye); Record, vol. 2, at 85 (testimony of Dr. Clements); Record, vol. 1, at 179 (testimony of Dr. Roos). Thus we cannot find clearly erroneous the trial court's determination that, for the retarded class members as a whole, Pennhurst cannot be an appropriate setting in which to provide habilitation.

But in making this wholesale judgment, the trial court did not adequately canvass the discrete needs of *individual* patients. For some patients a transfer from Pennhurst might be too unsettling a move. Longterm patients, for example, may have suffered such degeneration in the minimum skills needed for community living that habilitation outside an institution is a practical impossibility. Indeed, the Pennhurst Parents-Staff Association, which has participated as an amicus in this appeal, contends that this is true for many patients. Moreover, there seems to be some support among practitioners for this view as well.[37] We need not decide that issue here. All that we need recognize is that there may be some individual patients who, because of advanced age, profound degree of retardation, special needs or for some other reason, will not be able to adjust to life outside of an institution and thus will be harmed by such a change. The case must therefore be remanded for individual determinations by the court, or by the Special

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[37] *See e.g.*, Clements, *Reaction Comment*, in *The Mentally Retarded Citizen and the Law* 437 (President's Committee on Mental Retardation, 1976); M. Rosen, G. Clark, & M. Kivitz, Habilitation of the Handicapped (1977).

Master, as to the appropriateness of an improved Pennhurst for each such patient.

We base our ruling on the *nature* of the rights being enforced in this case. The framers of 42 U.S.C. §§ 6001-6081, as we have noted, did not anticipate a shutdown of all institutions when they endorsed a right to habilitation in the least restrictive environment. Rather, they recognized that for some patients institutions, once improved, might be appropriate. Similarly, we do not think that the Pennsylvania legislature, in providing a right to treatment in the Mental Health and Mental Retardation Act of 1966, intended to foreclose all institutionalization. In section 102 of that Act, for example, the legislature expressly included "institution[s]" within the category of "facilities" for which the Department of Public Welfare was responsible. Pa. Stat. Ann. tit. 50, § 4102. Thus, we see in the MH/MR Act of 1966 exactly the intent ascribed to it by Senator Peshan when he spoke in support of the measure.

> The object of this legislation is to make it possible for every mentally disabled person to receive the kind of treatment he needs, when and where he needs it.

1966 Pa. Legis. J., 3d Spec. Sess., No. 33, 76 (Sept. 27, 1966). The state statute, like the federal statute, was focused on *individual* needs. Since the statutory rights to treatment, state and federal, vindicate the individual patient's fundamental interest in personal liberty, it is only fitting that the Commonwealth be required to undertake a case-by-case investigation into how each person's rights may best be facilitated.

The right to the least restrictive environment also supports an individualized approach. Insofar as the right derives from sections 6001-6081, it is plain that no *per se* rule against institutions was contemplated. Moreover although we do not predicate our holding on a constitu-

tional right to treatment in the least restrictive setting, we note that such a constitutional right would protect the liberty interest of *individuals*. It would be anomalous to recognize the right to the least restrictive environment but never inquire whether a given individual can adjust to the environment to which he has been consigned. Thus to the extent that the district court predicated its blanket prohibition against institutionalization in Pennhurst on the fourteenth amendment, we disagree. Whatever the Constitution *requires* by way of least restrictive alternatives, it does not *preclude* resort to institutionalization of patients for whom life in an institution has been found to be the least restrictive environment in which they can survive.

Of course, deinstitutionalization is the favored approach to habilitation. The federal statutory material makes that clear and we acknowledge that constitutional law developments incline in that direction as well.[38] Thus, on remand, the court or the Master should engage a pre-

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[38] *See, e.g.*, Parham v. J.L., —— U.S. ——, 99 S. Ct. 2493, 2502-03 (1979); Secretary of Public Welfare of Pennsylvania v. Institutionalized Juveniles, 47 U.S.L.W. 4754, 4756 (U.S. June 20, 1979); O'Connor v. Donaldson, 422 U.S. 563, 575 (1975); Welsch v. Likins, 550 F.2d 1122, 1125-26 (8th Cir. 1977), *affirming in relevant part, vacating and remanding in part*, 373 F. Supp. 487 (D. Minn. 1974); Lake v. Cameron, 364 F.2d 657, 663 (D.C. Cir. 1966) (en banc); Evans v. Washington, 450 F. Supp. 483, 484 (D.D.C. 1978) (by consent decree); Eubanks v. Clarke, 434 F. Supp. 1022, 1027-28 (E.D. Pa. 1977); Gary W. v. State of Louisiana, 437 F. Supp. 1209 (E.D. La. 1976); Suzuki v. Quisenberry, 411 F. Supp. 1113, 1132-33 (D. Hawaii 1976); Lynch v. Baxley, 386 F. Supp. 378, 392 (M.D. Ala. 1974) (three judge court); Davis v. Watkins, 384 F. Supp. 1196, 1203, 1206 (N.D. Ohio 1974) (by stipulation); Saville v. Treadway, 404 F. Supp. 430, 433 (M.D. Tenn. 1974) (by stipulation); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded for a more specific order*, 414 U.S. 473, *order on remand*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated and remanded on other grounds*, 421 U.S. 957 (1975), *order reinstated on remand*, 413 F. Supp. 1318 (E.D. Wis. 1976); Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972); 344 F. Supp. 387 (M.D. Ala. 1972), *enforcing* 325 F.Supp. 781 (M.D. Ala. 1971), *affirmed in relevant part, remanded in part, and decision reserved in part*, Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

sumption in favor of placing individuals in CLAs. But the special needs and desires of individual patients must not be neglected in the process.

Finally, consideration must be given to the order directed to the future activity of the Base Service Units. That order essentially imposes an absolute ban on admissions to Pennhurst, paragraphs 9, 10, 446 F. Supp. at 1327, and requires that the defendants provide CLAs for all persons on the Pennhurst waiting list, *id.* at 1326, paragraph 1.

As we have noted with respect to current residents of Pennhurst, the court or the Master should engage in a presumption that individuals should be placed in CLAs. This presumption is equally important, if not more so with respect to applicants for future admission. However, we have recognized that although institutionalization is strongly disfavored, it is not foreclosed completely by the governing federal and state statutes. It is conceivable that in processing a given future application, a Base Service Unit will find that no available CLA is suitable for the individual, life in the community is not possible, and no other alternative institution in the relevant geographic area is available. Modification of the decree to permit admission to Pennhurst of such an individual while it remains open, but under court supervision as in the case of present residents, seems appropriate. This would provide for the interim accommodation of such persons while, as the decree contemplates, and the Commonwealth intends, Pennhurst is being phased out. We emphasize again, however, that any determination with respect to future applicants must always be made with the least restrictive alternative in mind and that the modification is appropriate only because an extreme situation calling for institutionalization might arise. The precise mechanism for court supervision of the Base Service Units in this regard we leave to the district court.

Naturally, nothing we have said here should be understood to disapprove the interim measures ordered by the trial court for the improvement of Pennhurst. Quite the reverse: state and federal laws plainly require that if Pennhurst is to remain open for at least some patients, it must be dramatically improved so as to provide adequate habilitation. Neither should our willingness to permit retention of Pennhurst as an institution available for those who cannot be treated in any less restrictive environment be construed as an invitation to the appellants to desist from opening up alternative community facilities. As we have said, institutionalization is a disfavored approach to habilitation. Only where the court or the Master finds that an improved Pennhurst is the only appropriate place for individual patients should it be used. For all other patients, CLAs must be provided.[39] We caution both the trial court and the Master that before ordering transfers to CLAs they must have assurances that the sanitary, staffings, and program deficiencies which were found at Pennhurst are not duplicated on a smaller scale in the CLAs. If staffing and programs are inadequate at the CLAs, then the goals of deinstitutionalization will not be met. Mere changes in the size of buildings and their location are not enough to meet the statutory requirements.

There are six other appeals pending in this court from orders entered subsequent to the March 17, 1978 order with which this opinion deals. By agreement of the parties, briefing has been postponed in these appeals pending disposition of this appeal. On remand, the district court should be free, despite the pendency of the appeals, to consider modification of the orders with which these ap-

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[39] We note, in this connection, that the development of suitable CLAs will impose little, if any, financial burden on the State and Counties. As we indicated in Part III, the trial court made a finding, unchallenged on appeal, that per patient cost in CLAs is less than at Pennhurst. *See* 446 F. Supp. at 1312.

peals are concerned, in the light of the modification of the March 17, 1978 order that we have directed. Because the district court is free to consider modification of the orders subsequent to March 17, 1978, the motions for stays of those orders are denied without prejudice.

VIII. CONCLUSION

With the exception of the order to find alternative employment for all Pennhurst employees, the order directing the eventual closing of Pennhurst, and the order banning all future admissions to Pennhurst, the judgment of the trial court will be affirmed in all respects. To facilitate the inquiry into the appropriate setting for each patient's habilitation, the court may if it chooses, permit particular organizations to intervene at the relief stage or create subclasses. Alternatively, it may allow the inquiry to proceed on a case-by-case basis. No matter how it is accomplished, however, an assessment of each class member's needs must be carried out. The case will therefore be remanded for further proceedings not inconsistent with this opinion. All parties shall bear their own costs.

SEITZ, *Chief Judge*, with whom *Judges* ALDISERT and HUNTER join, dissenting.

This case poses what is for the judiciary a singularly difficult and sensitive problem. At a federal judicial level, we are asked to interpret relatively new and innovative legislation and to embark upon uncharted constitutional waters. At a factual level, the record presents a mass of social science and medical data from which judges are asked to fashion legal rules.

Initially, I have no trouble agreeing with the majority that the conditions at Pennhurst revealed in this record

fall below a statutory or constitutional threshold of decency so as to merit judicial intervention. The district court adequately documented the deplorable conditions at Pennhurst. *See* 446 F. Supp. at 1302-11. Understaffing, filth, violence, enforced inactivity, and other horrors make Pennhurst, in the opinion of one well-traveled expert, one of the worst institutions of its kind in the world. Under these circumstances the federal courts have a right and a duty to intervene and to secure for Pennhurst's residents, at the very least, adequate living conditions. *Cf. Norris* v. *Frame*, 585 F.2d 1183 (3d Cir. 1978) (scrutiny of pre-trial detainee's conditions of confinement). I thus have no hesitation in agreeing that the federal judiciary should take the necessary steps to eliminate those conditions at Pennhurst.

Pennhurst as it exists today, however, must not obscure what is an entirely severable legal issue. That issue is the legality of institutionalization of the mentally retarded. The inquiry is not whether institutionalization is outmoded, undesirable, or unjustifiably expensive. Rather, the question is, assuming a Pennhurst without the deplorable living conditions here, may a federal court step in and say institutionalization is illegal, and if it can, what standard will the court employ in determining that illegality. It is on this issue that I part company with the majority.

The district court held that no matter how much one might change Pennhurst, it would never be legal to place a person in such a large institution. Although the majority rejects that theory, its position is that even if all the deplorable living conditions at Pennhurst are eliminated, it still is impermissible to place persons there if a large institution is not the least restrictive environment for that individual.

Such a rule goes far beyond the proposition that federal courts should require the state to eliminate the

deplorable conditions at Pennhurst. The effect of the rule is to require the state to create new facilities regardless of the feasibility or practicality of such a course of action. Moreover, because persons develop over time, the federal courts will become embroiled in almost continual supervision to ensure that each individual at any particular moment is in the least restrictive environment.

Although I believe improvement of Pennhurst to be mandatory, I do not believe a federal court may dictate to the state the type of treatment that best suits every individual. In my view, as long as the state runs all of its facilities free of the types of conditions that exist at Pennhurst today, then the state must be given latitude to choose in which of the facilities it will place a given individual. A federal court should remove a person from an institution or forbid a particular mode of treatment only in very limited circumstances. Because I can find no basis for the rule announced by the majority in statute or Constitution, I dissent from that portion of its opinion mandating a general right to individualized treatment in the least restrictive environment.

I. *Statutory Basis*

A. *Developmentally Disabled Assistance and Bill of Rights Act*

I will assume that the majority is correct in asserting, first, that patients at Pennhurst have a right to treatment under the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6000-6081 (the Act); and, second, that patients have an implied cause of action under the Act to enforce that right. These two conclusions, however, bring one no closer to an answer in this case, for it means little to say that a person has a "right" without defining it in a particular context. In

this case, one must ask exactly what are the contours and substance of the right to treatment.

The starting point for an answer to this question is the nature and history of the implied cause of action. In England as early as the thirteenth century, the king's courts fashioned private remedies by looking to duties imposed on the defendant by royal enactments. *See generally* J. Mashaw & R. Merrill, Introduction to the American Public Law System 969-71 (1975); Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in* Bell v. Hood, 117 U. Pa. L. Rev. 1 (1968). The essence of the implied cause of action is that the defendant breaches a duty imposed on him by a statute, and the breach in some way harms the plaintiff, who then may supplement the statutory scheme through a private suit. *See J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964). One cannot divorce the implied cause of action from a duty imposed on the defendant by the statute in question. Unless the defendant's activity violated the statute, there is nothing a court can properly redress.

Applying this precept to the case at hand, the question is whether the Act imposes a duty on the defendants to provide the least restrictive treatment possible to the plaintiffs. Unless it does the Act cannot be a proper basis for the majority's holding. I agree with the majority that the legislative history indicates a preference for least restrictive treatment, but a preference cannot be elevated into a mandatory duty without explicit statutory authority.

The Act nowhere places such a duty of least restrictive treatment on those states accepting federal funding. The Act is extremely explicit as to the duties of those states that receive such funds. The heart of the state's duty under the Act is section 6063. Before the state can re-

ceive funds, it must submit a plan to the Secretary of Health, Education, and Welfare (HEW) for approval. Prior to the 1978 amendments, section 6063(b)(20) required that the state's submission to HEW contain:

> a plan designed (A) to eliminate inappropriate placement in institutions of persons with developmental disabilities, and (B) to improve the quality of care and the state of surroundings of persons for whom institutional care is appropriate.[1]

Moreover, the state must maintain individual habilitation plans and an advocacy system to ensure that the general plan approved by HEW is properly implemented. *See* 42 U.S.C. §§ 6011-6012. *Cf. id.* §§ 6007, 6067 (establishing state and national planning and advisory commissions).

The requirement in section 6063(b)(20), however, in no way imposes an absolute duty on the state to provide the least restrictive treatment. For example, the regulation dealing with this portion of a state's plan provides:

> The State plan shall support the establishment of community programs as alternatives to institutionalization and support such programs designed to provide services for the care and habilitation of persons with developmental disabilities, and which utilize, to the maximum extent feasible, the resources and personnel in related community programs to assure full coordination with such programs and to assure the provision of appropriate supplemental

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[1] This specific requirement was eliminated in 1978. The new provision still requires, however, that the plan deal with non-institutional treatment, albeit in a more general way. *See, e.g.*, 42 U.S.C.A. § 6063(b)(5)(B)-(C) (1979 cumm. supp.). *Cf. id.* § 6063(b)(7)(B) (state plan must deal with right of employees displaced because of relocation of patients in community living arrangements).

> health, educational, or social services for persons with developmental disabilities.

45 C.F.R. § 1386.43 (1978). I fail to see how a duty to "support" "feasible" non-institutional care can be elevated to an absolute duty to provide the least restrictive treatment for every individual regardless of cost or available resources.

The Act elsewhere demonstrates that the state's limited resources may qualify its duty to provide alternate habilitation. For example, the state has primary control over where the funds are to be allocated. *See* 42 U.S.C. § 6003. Indeed, the House Report on the 1975 version of the Act stated:

> Since the Committee is well aware that current theory with regard to the treatment and support of the developmentally disabled emphasizes that this treatment should be conducted in the individual's community without unnecessarily institutionalizing him, the Committee has chosen to include a specific requirement that state programs plan for as much deinstitutionalization as is feasible, and earmark monies for this purpose. Knowing that this may require some increase in expenditures, the Committee has also increased the authorizations of appropriations.
>
> It is anticipated that these requirements will prompt some movement of patients from State institutions back into their communities. It is hoped that corresponding amounts of State and other funds currently being spent on institutional care will be re-budgeted for community care, an obvious rebudgeting that has not always occurred in conjunction with deinstitutionalization efforts.

House Rep. No. 94-58, 94th Cong., 1st Sess. 10, *reprinted in* 2 U.S. Code Cong. & Admin, News 919, 928 (1975).

This passage illustrates that Congress intended the Act as no more than an incentive to deinstitutionalization, not an imposition of a mandatory requirement regardless of fiscal concerns.

Thus the language and structure of the Act, the relevant regulations, and the legislative history all indicate that the states may consider their own resources in providing less restrictive treatment. The duty of the states under the Act is to provide alternative individual habilitation to the extent feasible, which includes a wide variety of fiscal concerns. Yet the import of the approach taken by the majority is exactly the opposite: it imposes a duty to provide less restrictive treatment, regardless of cost or available funds. This is an approach entirely inconsistent with the nature of an implied cause of action, which must rest on the breach of a statutory duty. In effect, the majority transforms the duty of providing *feasible* alternative treatment into an entirely different substantive obligation that has absolutely no basis in the statutory scheme. It is improper to say an implied statutory cause of action exists and then impose new substantive duties nowhere present in the statute in question.

The majority places great emphasis on section 6010, the bill of rights section. The broad rights declared in section 6010 can be given concrete meaning, however, only by reference to the other provisions in the Act. I do not believe, especially with a funding statute such as the one here, that general findings and declarations should be used as a charter for the creation of absolute obligations where Congress felt the states should be free to choose on their own as to the proper allocation of funds. *Cf. Beal* v. *Doe*, 432 U.S. 438 (1977) (Title XIX gives states latitude as to whether to spend federal funds on abortion). In sum, where Congress establishes a funding scheme designed to encourage a course of conduct, that

is no license to federal courts to make that conduct mandatory.

None of this is meant to denigrate the purpose of section 6010. The time has passed when retarded persons can be considered citizens without any rights whatsoever. Those rights conferred by this Act are important and a significant step on the road on which our nation has a far way to go. Yet the judiciary should not permit such feelings to exceed the obligations imposed on states by the Act. Because the Act nowhere imposes an absolute duty on funded states to provide the least restrictive treatment regardless of cost or feasibility, I would hold that the Act does not support those portions of the district court's order that create such an obligation.

B. *Rehabilitation Act of 1973*

The district court held that continued confinement at Pennhurst, which receives federal funds under Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.*, violated section 504 of the Rehabilitation Act of 1973.[2] That provision, as amended in 1978, states in relevant part:

> No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .

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[2] The arguments treated in this section are those of the plaintiffs, not the district court. That court concluded that "[i]n enacting Section 504 . . . Congress has in effect codified the constitutional right to equal protection." 446 F. Supp. at 1323. Because of its earlier conclusion that confinement at Pennhurst violated equal protection, *see* 446 F. Supp. at 1321-22, the district court felt that section 504 also had been violated. The district court's analysis of the section 504 claim accordingly is subsumed in my consideration of plaintiffs' equal protection claim. *See Part* II.B, *infra*.

29 U.S.C. § 794, as amended, Pub. L. 95-602, § 122(d)(2), 92 Stat. 2987 (1978).

The issue is whether section 504 mandates positive action by the state to create new, less restrictive habilitation facilities. On its face, the section merely says that states may not discriminate as to existing facilities; it does not require that the states take affirmative action. Thus in *Southeastern Community College* v. *Davis*, 99 S. Ct. 2361 (1979), the Supreme Court noted that section 504 did not require the state to create new facilities suitable for training nurses with hearing disabilities. After a thorough examination of the statutory structure and implementing regulations, the Court stated:

> If these regulations were to require substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals, they would do more than clarify the meaning of § 504. Instead, they would constitute an unauthorized extension of the obligations imposed by that statute.
>
> . . . Section 504 does not refer at all to affirmative action, and except as it applies to federal employers it does not provide for implementation by administrative action. A comparison of these provisions demonstrates that Congress understood accommodation of the needs of handicapped individuals may require affirmative action and knew how to provide for it in those instances where it wished to do so.

Id. at 2369 (footnote omitted).

The conclusion that section 504 imposes no such obligation in this case is supported by the legislative history. Most of the controversy surrounding the Rehabilitation Act concerned provisions other than section 504. As a result, legislative remarks about the purpose of that section are scarce and tend to restate the obvious. The pro-

vision's major thrust clearly is directed toward ensuring the handicapped equal access to federally-funded programs. *See, e.g.*, 118 Cong. Rec. 32,310 (Sept. 26, 1972) (remarks of Senator Humphrey); *id.* at 32,294 (Sept. 26, 1972) (remarks of Senator Cranston); Sen. Rep. No. 93-318, 93d Cong., 1st Sess., *reprinted in* 2 U.S. Code Cong. & Admin. News 2076, 2123, 2143 (1973).

Moreover, the structure and thrust of the Rehabilitation Acts of 1972 and 1973, of which section 504 was only one small part, undercuts plaintiffs' contention. The Acts essentially are funding statutes. They represent comprehensive attempts to deal with the plight of the handicapped, especially the most severely handicapped, *see* 29 U.S.C. § 701, through a system of federal grants to states for the development of the enumerated programs. *See id.* §§ 720, 721, 762. One of the clear purposes of these grants was to offer states financial incentives to deinstitutionalize the mentally retarded. *See, e.g.*, 118 Cong. Rec. 32,305 (Sept. 26, 1972) (remarks of Senator Javits); *id.* at 36,414 (Oct. 14, 1972) (remarks of Congressman Badillo).

Given the emphasis in the Rehabilitation Act of 1972 and 1973 on encouraging the states to deinstitutionalize, I do not believe that there should be read into section 504, included in both those acts, a legislative mandate for deinstitutionalization. The carefully tailored system of programs and grants in the legislation as a whole belies any congressional intention to impose an absolute duty to provide the least restrictive treatment.

Plaintiffs offer two less expansive arguments in support of the district court's holding that section 504 mandates Pennhurst's closing. First, they argue that section 504 requires the termination of a federal program designed exclusively for the handicapped if that program prevents its beneficiaries from participating in *other* fed-

eral programs. This is quite novel. No court that has granted relief under section 504 has even implied that such an interpretation is possible. *See, e.g., Leary* v. *Crapsey*, 566 F.2d 863 (2d Cir. 1977); *United Handicapped Federation* v. *Andre*, 558 F.2d 413 (8th Cir. 1977); *Lloyd* v. *Regional Transportation Authority*, 548 F.2d 1277 (7th Cir. 1977). Moreover, I believe that plaintiffs' argument cannot be justified on this record.

Plaintiffs allude throughout their briefs to a variety of federally-funded programs for the handicapped that are unavailable to Pennhurst's residents. The district court heard 32 days of testimony and argument in this case. The parties took 27 depositions. The exhibits included 108 photographs, a three-hour film, and 288 documents. An examination of this massive record does not reveal, however, a single federally-funded program from which Pennhurst residents have been excluded. Indeed, the United States intervening on behalf of plaintiffs, concedes that the record fails to demonstrate that any programs using such funds were available to anyone in the five-county area served by Pennhurst. Thus plaintiffs' first argument is without merit.

Plaintiffs alternatively argue that Pennhurst violates section 504 by denying its residents the benefits of Pennsylvania's program of community living arrangements. This denial allegedly is based impermissibly upon the severity of the handicaps of those confined at Pennhurst.

Significantly, Pennsylvania accepts no federal funds for the operation of its community living arrangements, choosing instead to finance the program out of its own revenues. In 1976, Pennsylvania served 2069 persons in community living arrangements, 483 of whom were from the five-county region served by Pennhurst. During 1976, Pennhurst itself served approximately 1200

residents. As places have become available in community living arrangements in the five-county area, Pennsylvania has filled half of them with residents of Pennhurst and half with other retarded individuals.

Plaintiffs would have us hold that this system violates section 504 because only the most severely handicapped persons are placed at Pennhurst. Almost fifty percent of Pennhurst's residents are profoundly retarded, having I.Q.'s of less than 20. Almost three quarters are at least severely retarded, with I.Q.'s of less than 36. In addition, many of the residents are multiply handicapped. Although, given proper facilities, all of these persons could be served "in the community," no one disputes that such severely handicapped persons pose difficult placement problems. Moreover, plaintiffs do not contend that Pennsylvania has now, or has ever had, adequate facilities in the community to cope with all, most, or even many of Pennhurst's present residents. Plaintiffs' only argument is that such facilities are feasible and that Pennsylvania violates section 504 by failing to develop them.

Presumably, such an expanded program of community living arrangements could be funded by federal grants under Titles XIV and XX of the Social Security Act, 42 U.S.C. §§ 1351 *et seq.*, 1397 *et seq.* Four states, Michigan, Minnesota, Nebraska, and Oklahoma, presently finance such programs under these titles. Section 504, however, cannot be read as requiring states to accept federal funds for such a program. On the contrary, in his comments on the Rehabilitation Act of 1972, which included a provision identical to section 504 as enacted, Congressman Badillo specified that the Act would allow states "to explore the possibility of using, as much as possible, a community-based treatment approach. . . ." 118 Cong. Rec. 36,414 (Oct. 14, 1972). Plaintiffs now argue that Pennsylvania, which has chosen

to use its own funds to "explore the possibility of using" community living arrangements, violates section 504 in failing to embrace that treatment approach completely and immediately. Because the legislative history reveals no more than a congressional intent to encourage deinstitutionalization, I believe that such a conclusion is untenable.

Therefore, I reject each of plaintiffs' arguments that institutionalization of the mentally retarded at Pennhurst violates section 504. Because that section supports neither the plaintiffs nor the majority, I must proceed to consider the other bases for the district court's order.

C. *Pennsylvania Law*

The majority holds that Pennsylvania's Mental Health and Mental Retardation Act of 1966 (MH&MRA), 50 P.S. §§ 4101 *et seq.*, grants the retarded a statutory right to treatment and that the plaintiffs have a private cause of action under the statute to enforce that right. The majority seems to implicitly rest its least restrictive treatment rule in part on Pennsylvania law.

I will assume that the residents of Pennhurst have a statutory right to some kind of treatment under the 1966 legislation. I cannot say as a matter of Pennsylvania law, however, that whatever treatment the residents are entitled to receive must be provided in the least restrictive environment possible. The question is: If the deplorable conditions evidenced in the record were eliminated at Pennhurst, would some individual still have an absolute right as a matter of state law to be placed in a less restrictive setting?

Initially, as with any implied cause of action, the remedy must be tied to violation of an express statutory provision. General language may not obscure the need for concrete imposition of a specific duty. Article II of the

MH&MRA sets out the duties of the state and nowhere does it mention a duty to provide the least restrictive treatment regardless of fiscal concerns.

Moreover, the structure of the MH&MRA itself implies that Pennsylvania's General Assembly, in enacting the legislation, contemplated no such absolute right to treatment outside a properly run institution if such were the least restrictive environment imaginable. A major purpose of the MH&MRA was to ensure proper division of responsibilities between the state's Department of Public Welfare (DPW) and local authorities, primarily cities and counties. *See* 50 P.S. §§ 4102, 4202(a), 4301 (d), 4507(a)(1). This division of authority indicates that DPW was to operate regional facilities like Pennhurst while the localities were to concentrate on community-based services such as after-care. The very fact that both exist side by side in the legislative scheme without any language about placement in one or the other belies any theory that the General Assembly intended an absolute right to one to the exclusion of the other.

Buttressing my conclusion that the MH&MRA contemplated institutionalization of the mentally retarded are statistics, cited by the district court, indicating that institutionalization as a means of providing for the retarded was on the rise through 1966, the year of the MH&MRA's enactment. *See* 446 F. Supp. at 1300n.7. The record shows that only in 1970 did Pennsylvania begin to explore the possibility of deinstitutionalizing Pennhurst's residents. *See* 446 F. Supp. at 1312. I believe it would be anomalous to attribute to the General Assembly of 1966 an intention to require treatment of the mentally retarded in a community setting because it would be less restrictive than an institution when the state did not even consider community treatment until 1970.

Nor do I believe that intervening changes in attitudes toward habilitation of the mentally retarded allow this court to reject the legislative judgment, implicit in the MH&MRA, that institutions, if properly run, can provide the mentally retarded with the requisite services. The General Assembly has not indicated that it has reached a contrary conclusion. Furthermore, the only Pennsylvania courts to consider analogous issues seem to have assumed that institutionalization is permissible without examining it as the least restrictive alternative under the MH&MRA. For example, in *Hoolick* v. *Retreat State Hospital*, 24 Pa. Commw. Ct. 218, 354 A.2d 609 (1976), *aff'd mem.*, 476 Pa. 317, 382 A.2d 739 (1978), the Commonwealth Court rejected a claim that the MH&MRA required DPW to continue to operate the Retreat State Hospital. In so ruling, the court noted that the hospital was "an institution within the framework of mental health facilities operated by the Commonwealth. . . ." *Id.* at 220, 354 A.2d at 610. According to the Commonwealth Court:

> The manifest object of the General Assembly in enacting the Mental Health and Mental Retardation Act of 1966 was to create a cooperative State-county (or multi-county) program across the Commonwealth for those who suffer mental health or mental retardation afflictions. . . . To retard or restrict State action in the operation of such a program, a clear specific legislative intent that a particular mental health facility shall remain functional would be required.

Id. at 224, 354 A.2d at 612. Thus under *Hoolick*, the legislature gave the DPW wide latitude in choosing what type of an institution best suits an individual.

Moreover, the state's duty to treat individuals is subject to the financial limitations of its own treasury. *Cf.*

County of Allegheny v. *Commonwealth*, 33 Pa. Commw. Ct. 267, 381 A.2d 1014 (1978) (state's liability to county not absolute). Indeed, in one case, the county placed an individual in a private home; because this was not authorized by the Act, the state was not liable to the county for the expenditure. *In the interest of Wayne K.*, 34 Pa. Commw. Ct. 10, 382 A.2d 989 (1978). At the least, then, the state right to treatment does not include a right to placement in a private home, even if that is the least restrictive environment.

Absent legislative action indicating that a particular type of facility, acceptable to the General Assembly in 1966, no longer passes legislative muster, I cannot predict that a Pennsylvania court facing this same question would hold that an individual has an absolute right to treatment in another less restrictive institution. I would hold only that, according to Pennsylvania law, any right the mentally retarded may have under the MH&MRA to habilitation can be satisfied in an institutional setting properly maintained.

II. *Constitutional Basis*

A. *Due Process*

The final question presented by the plaintiffs is the constitutionality of the state statutory scheme of institutionalizing people in Pennhurst. The district court held that retarded persons, once admitted to a state facility, "have a constitutional right [under the due process clause] to be provided with minimally adequate habilitation under the least restrictive conditions consistent with the purpose of the commitment." 446 F. Supp. at 1319. Having found such a right, the district court further held that Pennhurst, because it is an institution, could never provide minimally adequate habilitation, and that Pennhurst's residents were entitled to be

placed in community living arrangements. 446 F. Supp. at 1318, 1320.

The majority holds that some individuals may remain in Pennhurst, thus rejecting the district court's thesis. It purports to do this on statutory grounds, thereby avoiding the constitutional issue. The majority's apparent justification for failing to reach the constitutional issue is that the legislation involved here does not require less than is mandated by the Constitution. The majority merely makes this statement without explaining why its unarticulated view of the Constitution is correct and the district court's theory is incorrect. If, as I believe, the statutes in question provide no cause of action to enforce a generalized absolute right to least restrictive treatment, then the only remaining basis for the majority's holding is the Constitution.

My approach presents two questions. First, decide what are the permissible governmental purposes that support civil commitment of the mentally retarded. Second, determine whether those purposes are sufficient to support institutionalization or whether the state has a constitutional duty to employ means less restrictive of individual freedom.

In finding a constitutional right to habilitation, the district court relied on a series of cases that grant non-dangerous mental patients who are involuntarily committed a right to psychiatric treatment. The seminal right-to-treatment case was *Rouse* v. *Cameron*, 373 F.2d 451 (D.C. Cir. 1966), which dealt with a statutory right to treatment. In dictum, the court indicated that the failure to treat a mental patient who had been committed by the state was sufficiently "shocking" to violate due process guarantees. *See id.* at 455.

A number of courts have expanded upon *Rouse's* dictum. The Court of Appeals for the Fifth Circuit of-

fered the strongest defense of the right to treatment in *Donaldson* v. *O'Connor*, 493 F.2d 507 (5th Cir. 1974), *vacated on other grounds and remanded*, 422 U.S. 563 (1975), and *Wyatt* v. *Aderholt*, 503 F.2d 1305 (5th Cir. 1974), *aff'g*, *Wyatt* v. *Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971) (*Stickney I*). *Donaldson* noted that involuntary confinement must be justified by a legitimate state purpose to survive scrutiny under the due process clause. *See Jackson* v. *Indiana*, 406 U.S. 715, 738 (1972). Historically, civil commitment had been based on one of three grounds: danger to self, danger to others, or need for treatment. *See id.* at 737. Because uncontradicted evidence demonstrated that Donaldson was dangerous neither to himself nor to others, the only legitimate basis for his confinement was the provision of treatment. According to the Fifth Circuit, the state of Florida, which confined Donaldson to treat him, had a constitutional duty to provide him with adequate and effective treatment, the "quid pro quo" for his confinement. *See* 493 F.2d at 518-27.[3]

The first case to apply the right-to-treatment rationale to the mentally retarded was *Wyatt* v. *Stickney*, 344 F. Supp. 387 (M.D. Ala. 1972) (*Stickney II*), *affirmed in relevant part sub nom. Wyatt* v. *Aderholt*, 503 F.2d 1305 (5th Cir. 1974). Having determined in *Stickney I* that persons involuntarily committed to mental institutions had a right to treatment, the district court felt compelled to extend an analogous right to the mentally retarded. *See* 344 F. Supp. at 390.[4]

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[3] The Supreme Court in *Donaldson* stopped short of endorsing the quid-pro-quo approach. *See O'Connor* v. *Donaldson*, 422 U.S. 563, 576 (1975). Our court has specifically reserved ruling on the theory. *See Scott* v. *Plante*, 532 F.2d 939, 947 (3d Cir. 1976).

[4] Since 1972, a number of courts have followed *Stickney II* and have held that mentally retarded persons confined in state-run institutions have a constitutional right to habilitation. *See, e.g., Welsch* v. *Likins*, 373 F. Supp. 487 (D. Minn. 1974), *aff'd in part*

I can assume, without deciding, that a non-dangerous individual committed by the state because of an alleged mental illness has a right to receive psychiatric treatment for his or her condition. I do not agree, however, with the assertion made in *Stickney II* that, in this regard, "no viable distinction can be made between the mentally ill and the mentally retarded." 344 F. Supp. at 390. On the contrary, as the Supreme Court has noted in another context, "careful attention must be paid to the differences between [the] mentally ill and [the] mentally retarded. . . ." *Kremens* v. *Bartley*, 431 U.S. 119, 135-36 (1977). In particular, I believe that the government's purpose in depriving Pennhurst's residents of their liberty is quite different from the government's purpose in depriving a non-dangerous, mentally ill person of his or her liberty.

As noted earlier, the Supreme Court has identified three conditions that might justify civil commitment: danger to self, danger to others, and need for treatment. *See Jackson* v. *Indiana*, 406 U.S. 715, 737 (1972). In *O'Connor* v. *Donaldson*, 422 U.S. 563, 574 n.9 (1975), the Supreme Court briefly examined the "danger to self" rationale and indicated that it considered inability to care for oneself a permissible basis for civil commitment:

> Of course, even if there is no foreseeable risk of self-injury or suicide, a person is literally "dangerous to himself" if for physical or other reasons he is helpless to avoid the hazards of freedom either through his own efforts or with the aid of willing family members or friends.

No one disputes that most, if not all, of Pennhurst's residents are dangerous to themselves in this sense. Severely

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and vacated and remanded in part, 550 F.2d 1122 (8th Cir. 1977). In each of these cases, however, the court concluded or assumed that the state could provide the necessary habilitation in an institutional setting. *See, e.g., Gary W.* v. *Louisiana*, 437 F. Supp. 1209, 1217-19 (E.D. La. 1976).

or profoundly retarded, often with multiple handicaps, the residents obviously are unable to fend for themselves. Nor, as the district court's findings on voluntariness make clear, are there "willing family members or friends" available to shield them from the "hazards of freedom."

I believe that the residents' inability to live independently distinguishes this case from *Donaldson* and other cases granting non-dangerous mental patients a right to treatment. Moreover, I believe that the state's willingness to provide the residents with such necessities as food, shelter, medical care, and supervision for which the residents have no other source, forms an adequate basis for some state-imposed restrictions on their liberty.

I am left, of course, with the question whether the residents' need for care and supervision justifies the magnitude of the restraint imposed by institutionalization. The Court of Appeals for the Fifth Circuit has argued that it does not. In *Wyatt* v. *Aderholt*, 503 F.2d 1305, 1313 (5th Cir. 1974) (affirming *Stickney I* and *Stickney II*), the court emphasized that commitment entailed " 'massive curtailments' of individual liberty." The court continued:

> Against the sweeping personal interests involved, [the state of Alabama] would have us weigh the state's interest, and the interests of the friends and families of the mentally handicapped in having private parties relieved of the "burden" of caring for the mentally ill. The state interest thus asserted may be, strictly speaking, a "rational" state interest. But we find it so trivial beside the major personal interests against which it is to be weighed that we cannot possibly accept it as a justification for the deprivations of liberty involved.

Several factors persuade me to reject *Wyatt's* reasoning in the context of this case. First, that decision

preceded the Supreme Court's decision in *Donaldson*. As noted, the Supreme Court there indicated that the need to provide mentally handicapped persons with custodial care could, under some circumstances, support civil commitment. Moreover, to the extent that *Wyatt's* reasoning survived *Donaldson*, the realities of Pennhurst as recorded in the findings of the district court preclude its application in this case. The vast majority, almost 90 per cent, of Pennhurst's residents are 18 years of age or older. Under Pennsylvania law the duty of parents or relatives to contribute to the support of an unmarried person who has been committed or who is receiving services under the MH&MRA terminates upon that person's attainment of 18 years of age. *See* 50 P.S. § 4502. Moreover, relatives and friends who will accept responsibility for the care of Pennhurst's residents either do not exist or are unwilling or unable to do so. The district court found that 43 per cent of the residents have had no family contact in the past three years. The record does not show what percentage of the residents have family members still living. *See* 446 F. Supp. at 1302 & n.16. Even as to those residents under the age of 18, the district court found that Pennhurst "was and is their only alternative," *id.* at 1311 (footnote omitted), and that "they have no place else to go," *id.* at 1318. Given these findings, defendants are doing far more than relieving otherwise willing and able relatives of the burden of caring for the residents; they are acting as the residents' only source of food, shelter, supervision, and medical care. Far from being "trivial," these services are a matter of life or death to the residents. *See generally New York State Association for Retarded Children, Inc.* v. *Rockefeller*, 357 F. Supp. 752, 759-60 (E.D.N.Y. 1973), *consent judgment approved*, 393 F. Supp. 715 (E.D.N.Y. 1975), *aff'd*, 596 F.2d 27 (2d Cir.), *cert. denied*, 48 U.S.L.W. (Oct. 2, 1979). *But see Gary W.* v. *Louisiana*,

437 F. Supp. 1209, 1217 (E.D. La. 1976) (all members of plaintiff class were minor children).

Having concluded that the residents' need for care and supervision can support significant restrictions on their personal liberty, it nevertheless must be decided whether Pennsylvania must provide for the residents' needs in a manner least restrictive of those liberties, or whether it is sufficient that the restrictions be rationally related to the purpose of confinement. The district court here felt that *Shelton* v. *Tucker*, 364 U.S. 479 (1960), required use of less drastic means in general, and community living arrangements in particular. In *Shelton* the Supreme Court considered an Arkansas statute requiring every teacher to file an annual affidavit listing all organizations to which he or she belonged or contributed. In striking down the requirement as an unconstitutional abridgement of first amendment freedoms, the Court held that

> even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.

Id. at 488 (footnotes omitted).

It is quite possible that the Supreme Court has already rejected the contention that *Shelton's* less-drastic-means analysis applies to the conditions of civil commitment. *See State* v. *Sanchez*, 80 N.M. 438, 457 P.2d 370 (1968) (mentally ill), *dismissed for want of a substantial federal question*, 396 U.S. 276 (1970). *See generally Mandel* v. *Bradley*, 432 U.S. 173 (1977) (per curiam); *Hicks* v. *Miranda*, 422 U.S. 332 (1975); *Halderman* v. *Pennhurst State School & Hospital*, 446

F. Supp. at 1319 n.55; *Patton* v. *Dumpson*, 425 F. Supp. 621, 624 (S.D.N.Y. 1977). Nevertheless, I believe that the importance of this issue merits a full examination of plaintiffs' argument.

In two cases dealing directly with the conditions and duration of civil confinement the Supreme Court has not been required to reach the question whether a state must provide its mental health services in a manner least restrictive of fundamental liberties. In *Jackson* v. *Indiana*, 406 U.S. 715 (1972), the Court examined the constitutionality of a statutory scheme that permitted indefinite, and probably permanent, commitment of a person adjudged incompetent to stand trial on criminal charges. In holding that this procedure deprived the petitioner of due process of law, the Court reasoned that [a]t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Id.* at 738. Similarly, in *O'Connor* v. *Donaldson*, *supra*, 422 U.S. at 576, the Court explored the minimum protection afforded by due process, holding that "a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safety in freedom . . . ." In both *Jackson* and *Donaldson* the challenged restrictions were invalidated under this minimal scrutiny. But by employing the phrases "at the least" and "without more," the Supreme Court left open the possibility that it might apply stricter scrutiny in a proper case.

Recently, in *Bell* v. *Wolfish*, 99 S. Ct. 1861 (1979), the Supreme Court considered the constitutional requirements for the conditions under which pre-trial detainees may be confined. The plaintiff detainees, who were confined solely because of their inability to post bail, complained, *inter alia*, that the practice of assigning two detainees to a cell designed for one person denied them

due process of law. In upholding the constitutionality of "double-bunking," the Supreme Court declined to apply the "compelling necessity" test that had been adopted by the Court of Appeals for the Second Circuit. Instead, the majority focused on whether double-bunking constituted infliction of punishment, and phrased the standard of review as whether "a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective . . . ." *Id.* at 1874.

Bell, although dealing with the conditions of non-criminal confinement, is not dispositive of the standard of review to be applied in this case. The plaintiffs in *Bell* did not contend that double-bunking, as opposed to single-bunking, was unduly restrictive of any express constitutional guarantee. *See id.* at 1871. In this case, however, plaintiffs argue that institutions, when compared with community living arrangements, are more restrictive of such fundamental rights as freedom to travel and freedom of association. Assuming this to be the case, I will consider the applicability of some sort of less-drastic-means analysis.

The Supreme Court first formalized less-drastic-means analysis in *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960). Prior to that decision, the consideration of less restrictive alternatives was at least implicit in a number of opinions. *See The Supreme Court, 1960 Term*, 75 Harv. L. Rev. 40, 129 (1961) (collecting cases). Those earlier decisions, however, tended to treat less drastic alternatives as only one consideration in the overall assessment of an enactment's reasonableness. *Compare Shelton* v. *Tucker*, *supra*, at 488-90, *with id.* at 493-94 (Frankfurter, J., dissenting). In *Shelton* the Court seemed to hold that the existence of less drastic means would almost always invalidate a statute that impinged upon "fundamental personal liberties." *See id.* at 488.

Since 1960, application of less-drastic-means analysis has been far from uniform. *See, e.g., United States* v. *Robel*, 389 U.S. 258, 267 (1967) ("It is not our function . . . to determine whether an industrial security screening program exhausts the possible alternatives to the statute under review."); L. Tribe, American Constitutional Law 722-23 (1978); Note, *Less Drastic Means and the First Amendment*, 78 Yale L. Rev. 464, 464-65 (1969). Moreover, even in the prototypical situation, where an allegedly overbroad statute impinges upon first amendment guarantees, the Supreme Court has been extremely cautious in employing the analysis. *See* Note, *supra*, at 472. Carried to its logical extreme less-drastic-means analysis is, as Justice Blackmun has noted, a "slippery slope":

> A judge would be unimaginative indeed if he could not come up with something a little less "drastic" or a little less "restrictive" in almost any situation, and thereby enable himself to vote to strike legislation down.

Illinois State Board of Elections v. *Socialist Workers Party*, 99 S. Ct. 983, 993 (1979) (Blackmun, J., concurring).

I engage in this overview not to suggest abandonment of less-drastic-means analysis, but to emphasize the care with which it must be employed. In the proper context this mode of analysis is a useful instrument for detecting unconstitutional overbreadth. I believe, however, that the present case falls outside that context.

Implicit in rigid application of less-drastic-means analysis is a presumption that, absent countervailing governmental interests, an individual benefits from unfettered freedom. In some circumstances, of course, social interests prevail and mandate restriction of that freedom. Nevertheless, the search for less drastic means is a

judicial attempt to ensure that the intrusion is as small as possible.

This model falters where the individual, in the Supreme Court's words, is "helpless to avoid the hazards of freedom." *O'Connor* v. *Donaldson*, *supra*, 422 U.S. at 574 n.9. In such a case, the very purpose of the governmental intrusion is to prevent the individual from exercising his or her freedom in a self-destructive manner. Analytically, the difficulty is not an absence of less drastic means; in theory there will be some perfect balance between freedom and supervision, some "least restrictive alternative." Instead, the difficulty I perceive is a judicial inability to strike the perfect balance in any particular case. In an influential article cited with approval in *Shelton*, Elliot Richardson pinpointed the advantage of less-drastic-means analysis over the traditional balancing of interests employed by courts in first amendment cases:

> With the question whether the restriction of expression is a necessary means of protecting some other interest, we come back to judgments of a more objective character. The efficacy of the restriction of speech as such a means . . . [is] a matter as to which it could more easily be said than in the case of the value of a threatened interest that a legislative judgment was or was not plainly wrong. The same is true of the question whether other means are available.

Richardson, *Freedom of Expression and the Function of Courts*, 65 Harv. L. Rev. 1, 40 (1951). *See* 364 U.S. at 488 n.9. It is this objectivity, this ability to identify a single, better alternative, that commends less-drastic-means analysis.

This objectivity, however, counsels against use of the doctrine in the manner utilized by the district court. Here, there is not one ideal balance between freedom

and supervision, but 1200, one for each of Pennhurst's residents. Some residents are capable of surviving with only minimal supervision. Others require complete, if temporary, physical restraint. *See* 446 F. Supp. at 1328. This complexity precludes a single, objective solution, making use of less-drastic-means analysis to declare institutions, per se unconstitutional particularly inappropriate.

The problem is not solved by arguing that less-drastic-means analysis requires individualized determinations rather than condemnation of institutions as a class. In the first place, what is the least restrictive environment for any particular individual is primarily a medical question. As the record demonstrates, this concept is an uncertain one and has been the subject of fervent medical debate. I feel it inappropriate for courts to make such a judgment on the basis of a doctrine that contemplates an objective, single better alternative. Second, the least restrictive alternative for any particular individual will change over time. Thus there is no single and final solution—the heart of the less-drastic-means analysis—for each individual. By imposing upon a state a constitutional duty to provide its custodial care in the least restrictive manner, almost every decision concerning the care of a mentally retarded person would be subjected to ongoing judicial review.

Plaintiffs cannot salvage their proposed analysis by labelling community living arrangements as *the* least restrictive alternative. The definitional elasticity of the term "community living arrangements" [5] renders such an

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[5] Indeed, the record indicates that community living arrangements tend to be all things to all people. They apparently range from simple provision of support services so that a retarded person can remain with his or her family to subsidized foster care to mini-institutions of over 20 residents. The "community" is variously defined as urban, suburban, or rural. Stewart Brown, one of the plaintiffs' witnesses, illustrated the malleability of this con-

argument quite circular. Whether this setting is called a community living arrangement or something else, the federal courts would still be required to balance each resident's need for supervision and care against that resident's ability to cope with personal liberty. Such decisions traditionally, and I believe properly, have been left in the hands of physicians and mental health administrators.

Drawing from *Jackson*, *Donaldson*, and *Bell*, I would hold that where the state confines [6] a person against his or her will because of an inability of that person "to avoid the hazards of freedom," the conditions of that confinement must bear a reasonable relationship to the purpose of the confinement. I do not believe that a state can be constitutionally required to care for that person in a manner "least restrictive" of that person's freedom. Nevertheless, the availability of less drastic alternatives is one factor for a court to consider in determining the overall reasonableness of the challenged restraint. *See, e.g., Bell* v. *Wolfish, supra*, 99 S. Ct. at 1885 n.40.

In applying this standard of review to the case at bar, I again must stress that what is at issue here is not whether it is constitutional to place persons in Pennhurst

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cept when he was pressed on his contention that all of Pennhurst's residents could be dispersed to community living arrangements within one month:

> A: . . . There are seventy-one Holiday Inns in Pennsylvania with 11,208 rooms, and we could, with a *per diem* rate move those clients and provide an immediate place for them to live where they would be happy—
>
> Q: All right. Let's talk about community-living arrangements.
>
> A: That's one type of community-living arrangement.

[6] Plaintiffs have not challenged in this appeal the adequacy of the procedures under which they were committed or placed at Pennhurst. *See generally Secretary of Public Welfare of Pennsylvania* v. *Institutionalized Juveniles*, 47 U.S.L.W. 4754 (June 20, 1979).

as it existed when this record was created. There can be no question that Pennhurst is not providing its residents with minimally adequate supervision and care. Instead, the question is the constitutionality of institutions as they should be operated.

Moreover, my rejection of less-drastic-means analysis does not mean that I conceive of a "properly run institution" as a monolithic concept unrelated to the needs of particular individuals. What may be the appropriate treatment very likely will vary from person to person within the institution. The test I choose—a right to treatment rationally related to the purpose of the state-imposed restraints on liberty—applies to every individual, whether inside or outside an institution. Thus in my view, the phrase "properly run institution" means properly run as to all those confined in it. Given the current medical definition of retardation and the fact that I do not know what a properly run Pennhurst would be like, I leave for future cases the question of whether a particular individual placed in an institution free of the deplorable conditions in the record here would ever have a constitutional right to treatment in a different environment.

With these caveats in mind, I conclude that institutionalization is not a constitutionally unreasonable means of providing for the care and supervision of the mentally retarded. A large-scale institution is quite capable of providing its residents with adequate food, shelter, medical care, and other necessities. Moreover, given the residents' need for such services, an institution does not necessarily restrict their liberty in an unreasonable fashion. I am not dissuaded from this conclusion by the feasibility of less restrictive, more effective or even less expensive methods of caring for the retarded.[7]

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[7] Supporting my conclusion that institutionalization is not unconstitutionally unreasonable are those cases that, although finding a constitutional right to habilitation, have permitted the state

The choice among models for the care of the retarded properly rests with state authorities. Federal courts may not interfere with that choice unless the selected model is not a reasonable means of delivering the services that support civil commitment in the first place. I leave for future cases the determination of whether a given method of treatment is not rationally related to the state's objective in confining a particular individual.

B. *Equal Protection*

The district court also held that confinement at Pennhurst violated the equal protection clause of the fourteenth amendment because it entailed "segregation in a facility that clearly is separate and *not* equal." 446 F. Supp. at 1322 (emphasis in original). As in the case of their due process claim, plaintiffs' equal protection claim turns primarily on the proper level of judicial scrutiny to be applied to institutionalization of the mentally retarded.

Initially, I reject plaintiffs' contention that mental retardation qualifies as a "suspect classification." In *Doe* v. *Colautti*, 592 F.2d 704, 710-11 (3d Cir. 1979), we held that mental illness was not a suspect classification. We noted that, under *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, 313 (1976) (per curiam), "a class is not entitled to special solicitude under the Equal Protection Clause unless the members of the class have 'been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.' " 592 F.2d at 711. Applying this rule to the mentally ill, we noted:

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to continue to provide that habilitation in an institutional setting. *See, e.g., Gary W.* v. *Louisiana, supra*, 437 F.Supp. at 1217-19; *Wyatt* v. *Stickney* (*Stickney II*), *supra*, 344 F. Supp. at 395-407. *See also Wyatt* v. *Aderholt, supra*, 503 F.2d at 1313 (institutionalization is, "strictly speaking," rationally related to need for custodial care).

> Although the mentally ill have been the victims of stereotypes, the disabilities imposed on them have often reflected that many of the mentally ill do have reduced ability for personal relations, for economic activity, and for political choice. This is not to say that the legal disabilities have precisely fit the actual incapacities of the mentally ill individuals whom the law has burdened, but it is important that the legal disabilities have been related, even if imperfectly, to real inabilities from which many of the mentally ill suffer.

Id. I believe that this reasoning is equally applicable to the mentally retarded.

Alternatively, plaintiffs argue that where a classification burdens fundamental liberties, the state must show that the burden is necessary to achieve a "compelling" government interest. *See Shapiro* v. *Thompson*, 394 U.S. 618, 634 (1969). The state's interest in ensuring that these individuals receive adequate food, shelter, supervision, and medical care is compelling enough to justify the intrusion. Although *Shapiro* and other equal protection cases may imply that the state must employ less drastic means if they are available, *see, e.g.*, 394 U.S. at 637, I believe this analysis is inapposite for the reasons given in my discussion of the due process claim.

For these reasons I believe that, although Pennsylvania has classified the residents by institutionalizing them, such a classification is reasonably related to a legitimate, compelling state interest.

C. *Eighth Amendment*

The district court finally found that Pennhurst violated the residents' "Eighth and Fourteenth Amendment right to freedom from harm." 446 F. Supp. at 1320. To the extent that this alleged right would parallel the right to be free from punishment, recognized in *Bell* v.

Wolfish, 99 S. Ct. 1861 (1979), I have already expressed my view that institutionalization of the mentally retarded is "reasonably related to a legitimate government objective . . . ." *See id.* at 4512. To the extent that the alleged right to be free from harm, founded in the eighth amendment, would exceed the protection outlined in *Bell*, I do not believe the district court's analysis survives that decision.

III. *Summary*

I agree with the majority that plaintiffs have a right to have Pennhurst brought up to statutory and constitutional standards. I nowhere find a right to treatment in the least restrictive environment. Thus I would reverse those portions of the district court's judgment that contemplate a federal-court-ordered closing of Pennhurst or creation of new, less restrictive facilities. Although some portions of the order dealt with conditions at Pennhurst, because the district court ordered it closed it did not deal extensively with that problem. Therefore, I would remand to the district court for it to decide in the first instance how best to bring Pennhurst in compliance with statutory and constitutional requirements. Finally, I leave open the possibility that certain individuals in the future may be able to show that their particular mode of treatment is not rationally related to the state's purpose in confining them.

The majority's definition of habilitation has real emotional appeal. But its implementation is being provided by doctors, experts, and legislators. There is a danger in a case such as this that a court will permit the technical data to provide the sole basis for a legal rule where the problem is essentially medical.

Furthermore, the majority's conclusion implicates massive and continual involvement of the federal judiciary in the multiple problems of the mentally retarded. I

disagree with the majority because I cannot find any basis for holding that a federal court may require the state to create facilities for the retarded that the court deems to be the least restrictive. That is a right that, in my view, neither Pennsylvania nor federal legislation nor the Constitution gives to the plaintiffs.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 78-1490, 78-1564 and 78-1602

TERRI LEE HALDERMAN, a retarded citizen, by her mother and guardian, Winifred Halderman; LARRY TAYLOR, a retarded citizen, by his parents and guardians, Elmer and Doris Taylor; KENNY TAYLOR, a minor, a retarded citizen, by his parents and guardians, Elmer and Doris Taylor; ROBERT SOBETSKY, a minor, a retarded citizen, by his parents and guardians, Frank and Angela Sobetsky; THERESA SOBETSKY, a retarded citizen, by her parents and guardians, Frank and Angela Sobetsky; NANCY BETH BOWMAN, a retarded citizen, by her parents and guardians, Mr. and Ms. Horace Bowman; LINDA TAUB, a retarded citizen, by her parents and guardians, Mr. and Mrs. Allen Taub; GEORGE SOROTOS, a minor, a retarded citizen by his foster parents, William and Marion Caranfa, all of the above individually and on behalf of all others similarly situated; THE PARENTS AND FAMILY ASSOCIATION OF PENNHURST

PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS, JO SUZANNE MOSKOWITZ, a minor, by her parents and next friends, Leonard and Nancy Moskowitz, ROBERT HIGHT, a minor, by his parents and next friends, John and Jeanne Hight, DAVID PREUSCH, a minor by his parents and next friends, Calvin and Elizabeth Preusch, and CHARLES DINOLFI, On behalf of themselves and all others similarly situated,

Plaintiffs-Intervenors

UNITED STATES OF AMERICA
Plaintiff-Intervenor

vs.

PENNHURST STATE SCHOOL & HOSPITAL, DEPARTMENT OF PUBLIC WELFARE OF THE COMMONWEALTH OF PENNSYLVANIA, FRANK S. BEAL, Secretary of the Department of Public Welfare, STANLEY MEYERS, Deputy Secretary for Mental Retardation, Department of Public Welfare, HELENE WOHLGEMUTH, Former Secretary, Department of Public Welfare, ALDO COLAUTTI, Executive Deputy Secretary, Department of Public Welfare, WILBUR HOBBS, Deputy Secretary for Southeastern Region, Department of Public Welfare, RUSSELL RICE, JR., Commissioner of Mental Retardation for Southeastern Region, Department of Public Welfare, C. DUANE YOUNGBERG, Superintendent, Pennhurst State School & Hospital, ROBERT SMILOVITZ, Former Assistant Superintendent, Pennhurst State School & Hospital, JOSEPH FOSTER, Assistant Superintendent, Pennhurst State School & Hospital, MARGARET GREEN, BETTY UPHOLD, ALICE BARTON, P. E. KLICK, DR. PAROCCA, HELEN FRANCIS, employees and agent of Pennhurst State School & Hospital, JOHN DOCTOR, JAMES NURSE, JANE AIDE, JILL THERAPIST, RICHARD ROE, JANE DOE, unknown and unnamed staff, employees and agents of Pennhurst State School & Hospital, each individual Defendant sued individually and in his or her official capacity, GEORGE METZGER, JOSEPH CATANIA, and ROGER BOWERS, Commissioners for Bucks County, ROBERT STREBL, EARL BAKER, and LEO MCDERMOTT, Commissioners for Chester County, FAITH R. WHITTLESEY, CHARLES KEELER and WILLIAM SPRINGER, Commissioners for Delaware County, A. RUSSELL PARKHOUSE, FRANK W. JENKINS and LAWRENCE H. CURRY, Commissioners for Montgomery County, MAYOR FRANK L.

RIZZO and THE CITY COUNCIL OF PHILADELPHIA, as Authorities for Philadelphia County, PETER BODENHEIMBER, Mental Health/Mental Retardation Administrator for Bucks County, WILLIAM A. MCKENDRY, Mental Health/Mental Retardation Administrator for Chester County, P. PAUL BURRICHTER, Mental Health/Mental Retardation Administrator for Delaware County, HERMAN A. ROETHER, Mental Health/Mental Retardation Administrator for Montgomery County, and LEON SOFFER, Mental Health/Mental Retardation Administrator for Philadelphia County, Commonwealth of Pennsylvania Defendants Pennhurst State School & Hospital, Department of Public Welfare of the Commonwealth of Pennsylvania, Frank S. Beal, Stanley Meyers, Helene Wohlgemuth, Aldo Colautti, Wilbur Hobbs, Russell Rice, Jr., C. Duane Youngberg, Robert Smilovitz, Joseph Foster, Margaret Green, Betty Uphold, Alice Barton, P. E. Klick, Dr. Parocca, and Helen Francis,

Appellants in No. 78-1490

GEORGE METZGER, JOSEPH CATANIA, and ROGER BOWERS, Commissioners for Bucks County, and PETER BODENHEIMBER, Mental Health/Mental Retardation Administrator for Bucks County, ROBERT G. STREBL, EARL M. BAKER, and LEO MCDERMOTT, Commissioners for Chester County, and WILLIAM A. MCKENDRY, Mental Health/Mental Retardation Administrator for Chester County, FAITH RYAN WHITTLESEY, CHARLES C. KELLER, and WILLIAM A. SPENGLER, Commissioners for Delaware County, and P. PAUL BURRICHTER, Mental Health/Mental Retardation Administrator for Delaware County, and A. RUSSELL PARKHOUSE, FRANK W. JENKINS, and LAWRENCE H. CURRY, Commissioners for Montgomery County, and HERMANN A. ROETHER, Mental Health/Mental Retardation Administrator for Montgomery County,

Appellants in No. 78-1564

MAYOR FRANK L. RIZZO, THE CITY COUNCIL OF PHILADELPHIA, and LEON SOFFER,
Appellants in No. 78-1602

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 74-1345)

Present: SEITZ, *Chief Judge*, ALDISERT, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on January 9, 1979 and was reargued en banc on September 6, 1979.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed March 17, 1978, be, and the same is hereby affirmed with the exception of the order to find alternative employment for all Pennhurst employees, the order directing the eventual closing of Pennhurst, and the order banning all future admissions to Pennhurst, and the cause is remanded to the said district court for further proceedings consistent with the opinion of this Court. All parties shall bear their own costs.

Attest:

/s/ Thomas F. Quinn
THOMAS F. QUINN
Clerk

December 13, 1979

APPENDIX C

UNITED STATES DISTRICT COURT
E. D. PENNSYLVANIA

Civ. A. No. 74-1345

TERRI LEE HALDERMAN, a retarded citizen, by her mother and guardian, Winifred Halderman, *et al.*,
Plaintiffs

PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS *et al.*, on behalf of themselves and all others similarly situated,
Plaintiffs-Intervenors

UNITED STATES OF AMERICA,
Plaintiff-Intervenor

v.

PENNHURST STATE SCHOOL & HOSPITAL *et al.*,
Defendants

Dec. 23, 1977

On Injunctive Relief March 17, 1978

OPINION

RAYMOND J. BRODERICK, District Judge.

This is a class action in which the named plaintiffs are either residents or former residents of Pennhurst State School and Hospital, now known as Pennhurst Center ("Pennhurst"), an institution owned and operated by the Commonwealth of Pennsylvania, located in Spring City, Pennsylvania. These plaintiffs are all retarded persons, or their representatives, who claim injury based on viola-

tions of certain state [1] and federal [2] statutes as well as violations of certain constitutional rights [3] in connection with their institutionalization at Pennhurst. The plaintiffs seek both damages and broad equitable relief including the closing of Pennhurst, and mandating that the defendants provide them with education, training and care in their respective communities. "Habilitation" is the term of art used to refer to that education, training and care required by retarded individuals to reach their maximum development.

This matter was tried before the Court, sitting without a jury, over a period of thirty-two days, testimony being limited solely to the issue of liability. In connection therewith, the Court makes the following findings of fact and conclusions of law:

Mental retardation, by definition, is an impairment in learning capacity and adaptive behavior.[4] (Roos, N.T. 1-86). Retardation is wholly distinct from mental illness. Retarded individuals, just as other members of society, may suffer from mental illness. Mental retardation is primarily an educational problem and not a disease which can be cured through drugs or treatment. However, with proper habilitation, the level of functioning of every retarded person may be improved. (Glenn, N.T. 5-186).[5]

The incidence of mental retardation is about 3% in the general population. There are four basic levels of

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[1] 50 P.S. §§ 4101 *et seq.*, 4507, 4509.

[2] 29 U.S.C. § 794; 42 U.S.C. §§ 1983, 1986, 6010.

[3] First, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution.

[4] Intelligence is generally measured through intelligence quotient tests (I.Q.), while ability to deal with social environment is measured through social quotient tests.

[5] An individual may be functioning at a retarded level due to lack of education and/or training, and once supplied with that education and/or training, may be removed from the ranks of the retarded.

mental retardation: (1) mild (I.Q. 52-69) which comprises 89% of the mentally retarded population; (2) moderate (I.Q. 36-51) which comprises 6% of the mentally retarded population; (3) severe (I.Q. 20-35) which in conjunction with (4) profound (I.Q. less than 20) comprises 5% of the mentally retarded population. (Roos, N.T. 1-89, 1-90).

Pennhurst, as an institution for the retarded, was on trial. Recent years have witnessed an assault upon such institutions.[6] At issue is whether the residents at Pennhurst have been the victims of violations of their statutory or constitutional rights; specifically whether Pennhurst as an institution has been violating the statutory or constitutional rights of its retarded residents in failing to provide them with minimally adequate education, training and care.

History is replete with misunderstanding and mistreatment of the retarded. As Wolf Wolfensberger points out in *The Origin and Nature of Our Institutional Models* 3 (1975):

> It is chastening to recall that the retarded in American history were long grouped with other types of deviant groups. In early America, the Puritans looked with suspicion on any deviation from behavioral norms, and irregular conduct was often explained in terms of the supernatural, such as witchcraft. There is reason to believe that retarded individuals were hanged and burned on this suspicion. Later in New England, records show that lunatics, "distracted" persons, people who were *non compos mentis*, and those who had "fits" were all classed together, perhaps with vagabonds and paupers

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[6] *See, e.g.*, Mason & Menolascino, *The Right to Treatment for Mentally Retarded Citizens: An Evolving Legal and Scientific Interface*, 10 Creighton L.Rev. 124 (1976) [hereinafter cited as Mason & Menolascino].

thrown in . . . . Connecticut's first house of correction in 1722 was for rogues, vagabonds, the idle, beggars, fortune tellers, diviners, musicians, runaways, drunkards, prostitutes, pilferers, brawlers—and the mentally afflicted . . . . As late as about 1820, the retarded, together with other dependent deviant groups such as aged paupers, the sick poor, or the mentally distracted were publicly "sold" ("bid off") to the *lowest* bidder, i.e., bound over to the person who offered to take responsibility for them for the lowest amount of public support . . . .

The 10th (1880) U.S. census first combined "defectives," "dependents," and "delinquents" for reporting purposes. The Public Health Service combined "criminals, defectives, and delinquents" as late as the 1920's.

The National Conference on Charities and Correction, between about 1875 and 1920, often grouped the idiotic, imbecilic and feeble-minded with the deaf, dumb, blind, epileptic, insane, delinquent and offenders into one general class of "defectives." Few of us today are aware of the fact that the more contemporary term "mental defective" was coined to distinguish the retarded from these other "defectives," and it is no coincidence that many state institutions were for both the retarded and the epileptic. During the "indictment period," discussed later, an incredible range of deviances were associated with retardation; indeed, they were seen to be caused by it: illness, physical impediments; poverty; vagrancy; unemployment; alcoholism; sex offenses of various types, including prostitution and illegitimacy; crime; mental illness and epilepsy. All these were called the "degeneracies".

Institutions for a number of "deviant" groups were founded in the United States in the mid-nineteenth cen-

tury for the purpose of making the deviant less deviant. They were originally relatively small centers, often located within the community, in which intensive training could be concentrated on the deviants. Their emphasis was on education; they were viewed as temporary boarding schools, geared toward returning the individuals to their family or living group once appropriate skills were learned. By the late nineteenth century, however, these schools were replaced by asylums isolated from the community, where instead of providing the individual with the education and training necessary to return to the community, they provided the protection and care it was thought that these individuals required. The asylum grew to be viewed as a permanent residential facility for the deviant. In the more progressive states, the retarded received their own facilities separated from other "deviant" groups. With this concept came increased isolation and increased size permitting little time for habilitation. *See generally*, W. Wolfensberger, *supra* at 24-26. Pennhurst was the product of this era.[7]

I. *Procedural History*

This action was commenced in May, 1974. On November 26, 1976, it was certified by the Court as a class action, with the plaintiff class of retarded persons defined as:

> All persons who as of May 30, 1974, and at any time subsequent, have been or may become residents of Pennhurst State School and Hospital. The mem-

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[7] From 1860 to 1960 there had been a marked increase in the number of mentally retarded individuals residing in our nation's institutions. Since 1966, this number has been decreasing. In 1966, 99 out of every 100,000 mentally retarded individuals were institutionalized. By 1976, that number had dropped to 71 out of every 100,000. In 1976, 154,000 mentally retarded individuals were residing in state public institutions, 32,000 were in hospitals for the mentally ill and 32,000 were in private institutions of various kinds. (Roos, N.T. 1-92, 1-93).

> bers of the class are persons resident at Pennhurst State School and Hospital, persons residing in Bucks, Chester, Delaware, Montgomery and Philadelphia Counties who are on a waiting list for placement at Pennhurst State School and Hospital, and persons residing in Bucks, Chester, Delaware, Montgomery and Philadelphia Counties, who, because of the unavailability of alternate services in the community, may be placed at the Pennhurst State School and Hospital.

On February 4, 1977, by agreement of the parties, we entered an Order trifurcating the trial. This Order reads, in pertinent, part, as follows:

> Said trial will be bifurcated—the first phase limited solely to the issue of liability. At such time as the Court issues its findings of fact and conclusions of law thereafter, a date shall be set for the second phase of the trial—to determine what relief, if any, a federal court can and should grant in this situation. At the conclusion of the second phase of the trial, a date shall be set for the third phase of the trial, if one is deemed necessary,—to determine damages due Plaintiffs.

The first phase of this non-jury trial began on April 18, 1977 and ended on June 13, 1977, occupying thirty-two court days.

II. *The Parties*

The original complaint in this action was filed as a class action by Terri Lee Halderman, a retarded individual who had been admitted to Pennhurst on the application of her parents pursuant to 50 P.S. § 4402 [8] in

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[8] 50 P.S. § 4402 provides:

> (a) Application for voluntary admission to a facility for examination, treatment and care may be made by:

[Footnote continued on page 108a]

1966. On July 29, 1974, the first amended complaint was filed, adding as name plaintiffs seven other retarded individuals [9] who had been admitted to Pennhurst upon the application of their parents. The amended complaint also added as a plaintiff the Parents and Family Association of Pennhurst representing 200 parents of retarded residents at Pennhurst. The Association was organized in 1967 to protect the rights of retarded citizens at Pennhurst and other institutions. (First amended complaint at 4).

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[8] [Continued]

(1) Any person over eighteen years of age.

(2) A parent, guardian or individual standing in loco parentis to the person to be admitted, if such person is eighteen years of age or younger.

(b) When an application is made, the director of the facility shall cause an examination to be made. If it is determined that the person named in the application is in need of care or observation, he may be admitted.

(c) Except where application for admission has been made under the provisions of section 402(a)(2) and the person admitted is still eighteen years of age or younger, any person voluntarily admitted shall be free to withdraw at any time. Where application has been made under the provisions of section 402(a)(2), only the applicant or his successor shall be free to withdraw the admitted person so long as the admitted person is eighteen years of age or younger.

(d) Each admission under the provisions of this section shall be reviewed at least annually by a committee, appointed by the director from the professional staff of the facility wherein the person is admitted, to determine whether continued care is necessary. Said committee shall make written recommendations to the director which shall be filed at the facility and be open to inspection and review by the department and such other persons as the secretary by regulation may permit.

Where the admission is under the provisions of section 402(a)(2), the person admitted shall be informed at least each sixty days of the voluntary nature of his status at the facility.

[9] Larry Taylor, Kenny Taylor, Robert Sobetsky, Theresa Sobetsky, Nancy Beth Bowman, Linda Taub, and George Sorotos.

On January 17, 1975, the Court granted the United States of America leave to intervene as a party plaintiff.[10] On November 12, 1975, the Court, without opposition, granted leave to intervene to the Pennsylvania Association for Retarded Citizens ("PARC") and four retarded individuals,[11] three of whom were court committed to Pennhurst pursuant to 50 P.S. § 4406 [12] or an

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[10] On November 29, 1976, we denied defendants' motion to dismiss the United States for lack of standing. Defendants' attempt to mandamus this Court to dismiss the United States failed. *Beal* v. *Broderick* (3d Cir. 1976), *cert. denied*, 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977).

[11] Jo Suzanne Moskowitz, Robert Hight, David Preusch, and Charles DiNolfi.

[12] 50 P.S. § 4406 provides:

> (a) Whenever a person is believed to be mentally disabled, and in need of care or treatment by reason of such mental disability, and examination of such person has been made by a physician or physicians, or for any reason the examination of such cannot be made, a petition may be presented to the court of common pleas of the county in which a person resides or is, for his immediate examination or commitment to an appropriate facility for examination, observation and diagnosis.
>
> (1) The petition may be made by a relative, guardian, friend, individual standing in loco parentis or by the executive officer of an authorized agent of a governmental or recognized nonprofit health and welfare organization or agency or any responsible person.
>
> (2) The petition shall set forth the facts upon which the petitioner bases his belief of mental disability and the efforts made to secure examination of the person by a physician.
>
> (3) Said court upon consideration of such petition shall: (i) issue a warrant requiring that such person be brought before said court; (ii) fix a date for a hearing which shall be as soon as the warrant is executed, and (iii) notify the parties in interest.
>
> (4) After hearing, said court may: (i) order an immediate examination by two physicians appointed by said court, or (ii) order the commitment of the person believed to be mentally disabled, to a facility for a period not exceeding ten days for

earlier statute. PARC is a non-profit corporation which was founded in 1950 (Schmidt, N.T. 14-108) and has member chapters in fifty-seven of Pennsylvania's sixty-seven counties; its purpose being to advance the interest of retarded persons in Pennsylvania. The members of PARC include parents, other relatives, guardians, and next friends of persons residing at Pennhurst, and those in jeopardy of residing there.

Defendants are: Pennhurst; the Pennsylvania Department of Public Welfare; various state and county [13] officials responsible for supervising the Commonwealth's and the counties' retardation programs; and the superintendent and various employees of Pennhurst.

III. *Education, Training and Care (Habilitation) Afforded the Retarded at Pennhurst*

Pennhurst, a residential institution for the retarded, was founded in 1908. It is owned and operated by the

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the purpose of examination. If the examination can be accomplished by partial hospitalization said court may so direct.

(b) If, upon examination, it is determined that such person is in need of care at a facility, the examining physicians or director, as the case may be, shall immediately report to said court which may order the commitment of such person for care and treatment.

In its order of commitment, said court may permit partial hospitalization or outpatient care, or if at any time thereafter the director shall determine such partial hospitalization or outpatient care to be beneficial to the person so committed, the same may be permitted by said court upon application by the director.

The court in *Goldy* v. *Beal*, 429 F.Supp. 640 (M.D.Pa. 1976) (three-judge court) found this statute unconstitutionally vague with respect to the commitment of mentally ill persons. Pennsylvania's procedure for the involuntary commitment of mentally ill persons is now found in 50 P.S. §§ 7301-7306. The constitutionality of § 4406 as it applies to the retarded is not challenged in this litigation.

[13] Representing Bucks, Chester, Delaware, Montgomery and Philadelphia Counties.

Commonwealth of Pennsylvania, and is located in Spring City, Pennsylvania about 30 miles from Philadelphia. Since its founding in 1908, the institution has been overcrowded and understaffed. (PARC Exhibit 40, R. Smilovitz, Pennhurst in Perspective: Purpose, Programs, Possibilities.) The present resident population is approximately 1,230, reduced from a high of nearly 4,000 in the early 1960's. (Youngberg, N.T. 22-123). Its staff numbers approximately 1,500. All parties concede that the institution has undergone tremendous improvement since the 1950's when, at best, the residents' treatment could be described as "warehousing". Even with these improvements, it was admitted by the defendants that Pennhurst does not presently meet minimum standards for the habilitation of its residents. (Rice, N.T. 26-24; Youngberg, Deposition at 22-31).[14]

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[14] Pennhurst must satisfy both federal and state licensing standards to qualify for federal medical assistance (Title XIX funds), standards which Dr. Youngberg and Dr. Rice equated with minimally accepted professional standards. (Rice, N.T. 27-57; Youngberg, Deposition at 27). Both the individual and the area in which he or she resides must be certified in order for the institution to qualify for funds. At Pennhurst only 16 out of the 40 living areas have been certified, though a majority of these areas have deficiencies. The deficiencies have either been waived, or Pennhurst has filed plans for correcting the deficiencies. (Pool, N.T. 18-27, 28-28). Five hundred fourteen residents live on these 16 wards and are eligible for funding. Another 600 Pennhurst residents would be eligible were they to reside on a certified ward. (*Id.*, N.T. 17-209).

To meet medical assistance living standards, the population of Pennhurst must be reduced to 850 residents. In addition, $1,028,327 is being expended to correct Life Safety Code violations—the completion date of this project is December 31, 1977 (the project was awarded in December, 1975, with an original completion date of April, 1977).

To meet medical assistance care standards, Pennsylvania is planning to expend an additional $2,367,500. (Rice, N.T. 26-6). The institution is presently in jeopardy of losing its current certification if the waivers it presently has, contingent on repairs being made, are withdrawn. (*Id.*, at 26-13, 26-14).

Approximately half of the residents at Pennhurst have been admitted upon application of their parents or guardians, while the other half have been committed by a court. (Youngberg, N.T. 22-122). No distinction is made in the services is extended to either group. The average [15] resident age at Pennhurst is 36, and the average stay at the institution is 21 years. Forty-three percent of the residents have had no family contact within the last three years.[16] Seventy-four percent of the residents are severely to profoundly retarded.[17] The average resident has had one psychological evaluation every three years and one vocational adjustment service report every 10 years. Those residents who have had more than one Vineland examination (measuring social quotient) during their residency at the institution, have, on the basis of this test, shown a decline rather than an increase in social skills while at Pennhurst (they declined an average of 7.542 points during their residence at Pennhurst, a loss of .596 points per year.) [18]

At its best, Pennhurst is typical of large residential state institutions for the retarded.[19] These institutions

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[15] The statistics set forth in this paragraph are taken from a systematic sampling of 10% of the resident population at Pennhurst. (PARC Exhibit 48).

[16] It is unclear what percentage of the residents have family members still living.

[17] See text following note 5, *supra*.

[18] It appears that the Vineland has an inherent bias against retarded individuals from age ten through twenty-five, in that social quotients over this period, as measured by the Vineland, have a tendency to decline. (Hare, N.T. 8-195, 8-196). This phenomena ceases once the individual reaches the age of twenty-five. (*Id.*, N.T. 8-203). An analysis of those Pennhurst residents who had received at least two Vineland examinations since their twenty-fifth birthday showed an average regression of 2.3 points. (*Id.*, N.T. 9-16).

[19] Dr. Gunnar Dybwad, who has visited institutions for the retarded in 49 states testified that Pennhurst was in the bottom category of the large residential state institutions for the retarded. (N.T. 7-62).

are the most isolated and restrictive settings in which to treat the retarded. (Lancaster-Gaye, N.T. 4-79). Pennhurst is almost totally impersonal. (*Id.*, N.T. 4-71). Its residents have no privacy (Roos, N.T. 1-149)—they sleep in large, overcrowded wards (Youngberg, Deposition at 22), spend their waking hours together in large day rooms and eat in a large group setting. (Clements, N.T. 2-57, 2-71, 2-72). They must conform to the schedule of the institution which allows for no individual flexibility. Thus, for example, all residents on Unit 7 [20] go to bed between 8:00 and 8:30 p.m., are awakened and taken to the toilet at 12:00-12:30 a.m. and return to sleep until 5:30 a.m. when they are awakened for the day (Barton, Deposition at 21-26, 33-34; Roos, N.T. 1-50), which begins with being toileted and then having to wait for a 7:00 a.m. breakfast.

A. *Staffing*

On the whole, the staff at Pennhurst appears to be dedicated and trying hard to cope with the inadequacies of the institution. (Hersh, N.T. 13-130).[21] Many of the problems at Pennhurst result from overcrowding and understaffing.[22] As professionals leave the staff, they are often not replaced, their jobs being turned over to direct care staff; thus, in the last two years nineteen professionals have left the staff without being replaced. (Roos,

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[20] Pennhurst is organized around the unit system and is composed of nine units, representing various levels of educational and behavioral development and physical handicap. (United States of America Exhibit 10).

[21] As defendants themselves have expressed it: "The staff at Pennhurst is a dedicated lot with precious little to work with." Commonwealth Defendants' Post-Trial Proposed Findings of Fact and Legal Arguments at 5.

[22] In his budget proposal for fiscal year 1977-78, Superintendent Youngberg requested 23 additional ward clerks, 1 additional unit secretary and 717 mental retardation aides. (Youngberg, Deposition at 42).

N.T. 1-153). Nearly every witness who testified concerning Pennhurst stated that it was grossly understaffed to adequately habilitate the residents. None of the standard reference sources now generally used by professionals in the field of mental retardation define the qualifications and minimal numbers of mental retardation professionals necessary to provide minimally adequate programs of habilitation. (Clements Report at 6). However, the court in *Wyatt* v. *Stickney*, 344 F.Supp. 387 (N.D.Ala. 1972), attempted to provide such guidelines. A comparison of the *Wyatt* ratios to those at Pennhurst in 1975 [23] reveals:

	Wyatt Standards	Pennhurst
a. Psychologists	23	23
b. Social Workers	40	6
c. Vocational Therapists	5	4
d. Recreation Therapists	23	0
e. Occupational Therapists	18	10
f. Registered Nurses	95	54
g. Physicians	7	6
h. Physical Therapists	14	2
i. Speech and Hearing Therapists	14	9
j. Dentists	7	4
k. Chaplains	7	4
l. Teachers [24]	51	8

(Clements, N.T. 2-26, 2-27).

No psychologists are on duty at Pennhurst at night or over the weekend, thus, if a resident has an emotional crisis, he or she may go without treatment until the next morning or until the weekend is over. (Riznyk, N.T. 17-182). Moreover, routine housekeeping services are not available during evenings and weekends, thus it

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[23] There was no testimony that these ratios have changed dramatically in the intervening two years, though 19 professional positions have been eliminated since Dr. Clements' tour of Pennhurst. (Roos, N.T. 1-153).

[24] In 1975, 206 school age residents were enrolled in the school program operated by IU teachers. There teachers were excluded from the calculation.

is common to find urine and feces on ward floors over these periods. (Smith, Deposition at 41; Roos, N.T. 1-158).

B. *Habilitation at Pennhurst*

All parties to this litigation are in agreement that Pennhurst as an institution is inappropriate and inadequate for the habilitation of the retarded. It is also admitted that the inadequacies in programming at Pennhurst are directly attributable to staff shortages. Residents' records commonly contain a notation that they would benefit from specific types of programming. However, such programming has, for the most part, been unavailable to the individual because of staff shortages. (Foster, Deposition at 42; DeAngelis, N.T. 16-49). The average resident receives only 1½ hours of programming per weekday and no programming on weekends. (Thurman, N.T. 14-60; DeAngelis, N.T. 16-31). No one, except those in school, gets more than 3½ to 4 hours per day. If one factors out those programs which are not considered beneficial, the average drops to about fifteen minutes per day. (Thurman, N.T. 14-60).[25] Some residents receive no programming due to their extreme hyperactivity, medical problems, or their own refusal of treatment. (DeAngelis, N.T. 16-32; Cooper, N.T. 29-46). Some individuals have not been accepted into occupational therapy, since only group programs are available and they require individual attention. Some Pennhurst residents have been dropped from existing programs due to lack of progress and motivation. The record indicates

[25] For example, the programming for residents on Unit 8, the unit in which the most aggressive residents reside, includes several hours per day during which the residents watch TV. Mr. Pirmann the Director of the unit, testified that this was to increase the residents' attention span and to teach them to sit and tolerate the presence of others. (N.T. 19-104, 19-105). "Programming" such as this appears to be primarily for the convenience of the staff, rather than for the benefit of the residents. (Thurman, N.T. 14-68).

that the residents at Pennhurst are made to fit into existing programs, and that the programs are not altered to fit the needs of the individuals. Further, it appears that an individual's motivation and not his or her needs determine whether the resident continues with the program. (Hare, N.T. 8-180, 8-181).[26]

Residents are referred to special programs at Pennhurst, but often, due to staff shortages, placements are not made. (DeAngelis, N.T. 16-40, 16-41). Almost every service offered at Pennhurst has a long waiting list. (Foster, Deposition at 42). For example, as of April 15, 1977, there were 511 residents on the referral list for occupational therapy. (Hilker, N.T. 20-43). While 50-60 Pennhurst residents have wheelchairs which have been individually adapted to meet the individual's needs, 75-100 residents need such adaptions. (Fekula, N.T. 20-99). The consequences for the resident not having his or her wheelchair adapted are especially grave, including: (1) loss of vital functions; (2) severe muscular contractions; and (3) loss of ability to be programmed. (*Id.*, N.T. 20-101). While over 300 residents at the institution have

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[26] George Sorotos, a named plaintiff, was enrolled in speech therapy at the end of 1972. At that time, he was unable to communicate, and his program was designed to develop his communicative skills. Though initially he made progress, he soon plateaued. In August, 1973, he was switched to a manual communication program. This continued for six months, again with some initial success. During each program, he was self abusive, which the staff attributed to frustration. He was never able to use these skills for communication. George Sorotos was terminated from all speech activity because the director of the speech and hearing department determined that her time would be better spent with other residents with whom she could accomplish more. (Riggott, N.T. 20-160 to 20-164). Thus, since George Sorotos did not respond well and was self abusive, he was denied speech therapy, a skill essential for his habilitation.

Similarly, plaintiff Terri Lee Halderman was initially included in speech therapy, but because of abusive tendencies, both to herself and to others, she was dropped from the program. (*Id.*, N.T. 20-164 to 20-166).

hearing impairments, only 51 have been fitted with hearing aids. There are 106 residents on the waiting list for speech therapy, and nearly every resident at Pennhurst could benefit from some type of communication programming. (Riggot, N.T. 20-155).[27] Three to four hundred residents presently need physical therapy to prevent physical deterioration, however, only 143 are receiving this therapy. (Rossi, Deposition at 12, 22).[28]

Pennhurst has established a communication center for 22 non-verbal individuals, but the institution has approximately 300 non-verbal residents. In theory, the residents in the communication center spend their day in classes learning signing (*i.e.*, sign language skills), academics, and self-care skills. However, when there is only minimal staff coverage, classes are not offered since the staff is totally occupied with custodial tasks. During the month of April, 1977, there were 5 days during which there was minimal coverage on the first shift (7:00 a.m.-4:00 p.m.); 25 days of minimal coverage on the second shift (4:00 p.m.-11:00 p.m.); and thirty days of minimal coverage on the third shift (11:00 p.m.-7:00 a.m.)—on five of these days during the third shift, there was less than minimum staff coverage. (Nelson, N.T. 21-23, 21-24).

Not only is the programming at Pennhurst inadequate to meet minimum professional standards (Rice, Deposi-

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[27] Some residents have been on the waiting list for at least 3½ years. (Nelson, N.T. 21-27).

[28] Pennhurst does an especially inadequate job for those with motor disabilities. Dr. Lancaster-Gaye, an expert in, among other things, the management of services for severly disabled persons (N.T. 4-69), toured the institution in March, 1977 and reported that young retarded individuals who suffered from cerebral palsy were sitting on the floor in positions which would lead to physical deterioration. He stated that these individuals were receiving little physical therapy and that without such therapy, the muscles in the limbs of these youths would contract and become useless. (N.T. 4-74, 4-75).

tion at 179, 180), but so are the evaluations performed on the residents to determine what is required to adequately habilitate the individual. None of the residents at Pennhurst had a full multi-discipline assessment as of January, 1977. (PARC Exhibit 53; Flueck, N.T. 4-9). Twenty and six-tenths percent of the residents have not received a limited multi-discipline assessment since January, 1975, and those assessments which have been made are generally limited to psychological, speech and hearing skills and are rarely concerned with vocational or self-care skils. (Hare, N.T. 8-165, 8-166). Proper habilitation cannot be provided to retarded persons unless those responsible for providing such programs are aware of the individual's needs.

Defendants have not made "full exit plans," *i.e.*, plans delineating: (1) a place for each individual to live outside of Pennhurst; (2) the daily activity necessary for each individual living outside Pennhurst; (3) necessary support services; and (4) the person who would be responsible, for any Pennhurst resident.[29] Such plans are very important in planning for the resident's eventual return to the community from the institution.

Defendants have also failed to make full "program plans," *i.e.*, plans containing: (1) identification of long and short term goals; (2) specification of the conditions under which the individual might achieve these goals; and (3) specification of the criteria to evaluate the individual's mastery of the goals, for Pennhurst residents.[30]

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[29] Sixty and eight-tenths percent of the residents had no mention of the community or of an exit plan in their files, and those that had some indication that the individual's eventual exit from the institution had been considered, never specified the type of placement which would be required nor who would be responsible for the individual. (Hare, N.T. 8-167).

[30] Twenty-eight and nine-tenths percent had no program plan. Those that did have some plan rarely had a precise statement of goals and objectives. (Hare, N.T. 8-166).

The record keeping at Pennhurst is also below acceptable minimum standards. (Clements, N.T. 2-22). Adequate record keeping is essential for proper habilitation of the residents.[31] Without such records, the staff will not know what the individual is already able to do, what type of care he or she should be receiving, and how to evaluate progress made by the individual. (*Id.*)

Pennsylvania's immediate plans for Pennhurst call for a reduction of the population at the institution to 850[32] and to provide, by July 1, 1978, 2½ hours of programming per resident per day. Dr. Rice, the Commissioner of Mental Retardation for Southeast Pennsylvania felt that such programming would fulfill the minimum requirements to qualify for medical assistance (*i.e.*, federal financing). However, he knew of no other set of standards which would consider this level of programming minimally acceptable, and personally did not feel that it was adequate. (N.T. 27-78). As a matter of practice, the Department of Mental Retardation for the Southeast Region will not approve a community living arrangement for a mentally retarded individual unless it provides for programming of at least five and one-half hours per day. (Rice, N.T. 27-80).

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[31] An individual's record should contain: (1) a current comprehensive evaluation of the individual; (2) a list of short and long term goals for the individual; (3) a specific plan outlining the procedures to accomplish these goals. The program should also provide for on-going monitoring, periodic re-evaluations of the individual, and periodic modifications of the objectives and procedures to reflect the findings of the re-evaluations. (Roos, N.T. 1-115, 1-116).

[32] Decreasing the population to 850 is contingent on an increase in funds appropriated by the Pennsylvania legislature, along with an ambitious placement program—unfortunately much of this placement is from one institution (Pennhurst) to other institutions rather than to the community.

C. *Restraints at Pennhurst*

At Pennhurst, restraints are used as control measures in lieu of adequate staffing.[33] (Clements, N.T. 2-82, 2-84; Roos, N.T. 1-135; Sprague, N.T. 3-44; Hersh, N.T. 13-153, Foster, Deposition at 81). This is not to say that restraints should never be used in the habilitation of the retarded. When an individual's aggressive behavior interferes with his or her ability to take advantage of other programming which the individual should receive, or poses a physical threat to him or herself and others it may be proper to restrain that person. Soon, it is hoped, once the individual has benefited from the other programming, the restraint will not be needed. (Clements, N.T. 2-86). It is generally conceded that most, if not all, outbursts of violence by the retarded can be prevented by adequate programming.

Seclusion rooms[34] have been used to punish aggressive behavior. One eighteen year old individual spent six consecutive days in seclusion in 1974 for assaulting a Down's Syndrome resident. (Lowrie, N.T. 5-6, 5-7). In 1975, a committee was formed to investigate the use of seclusion rooms at Pennhurst. It recommended that seclusion rooms, if they were to be used at all, should be limited to medical emergencies and should not be utilized for punishment. (Lowrie, N.T. 5-5). Seclusion rooms are still in use at Pennhurst (M. Conley, N.T. 16-150;

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[33] Restraints can be either physical or chemical. The physical restraints range from placing the individual into a seclusion room to binding the person's hands or ankles with muffs or poseys, and binding the individual to a bed or a chair. Chemical restraints are usually psychotropic (*i.e.*, tranquilizing) drugs.

[34] The seclusion rooms at Pennhurst are small rooms generally with one window and one door. The walls are masonry, the floors either tile or terrazzo—both hard surfaces. None of the rooms are padded. Many have exposed radiators, and other potentials for danger to the resident placed within it. (Youngberg, Deposition at 69; Lowrie, N.T. 4-183 to 4-190).

Boyle, N.T. 17-72, 17-73; L. Miller, N.T. 77-102; Malone, N.T. 17-140, 17-141; Lowrie, N.T. 5-71), though the incidence of their use is less than it was in years past. There is now a policy that seclusion rooms be used only for medical emergency, when a resident becomes extremely abusive, and no other alternative will control the individual. One-to-one interaction with staff members is often effective in calming the resident and stopping this maladaptive behavior. However, since normally the wards are, at best, minimally staffed, there frequently is not a staff person who can be spared to participate in this intensive interaction. (Lowrie, N.T. 5-9; Miller, N.T. 17-122). Thus, seclusion is often necessary only because there is insufficient staff. (Lowrie, N.T. 4-131).[35]

Often physical restraints are also used due to staff shortages. An extreme example is a female resident who, during the month of June 1976, was in a physical retraint for 651 hours 5 minutes; for the month of August, 1976, was in physical restraints for 720 hours; during September, 1976, was in physical restraints for 674 hours 20 minutes; and during the month of October, 1976, was in physical restraints for 647 hours 5 minutes. (Matthews, Deposition at 64-68). This resident was extremely self-destructive—she totally blinded herself. She was not enrolled in occupational therapy until 1977. Once initiated, her programming has apparently been quite successful, and she is now able to be out of restraints for as much as four hours per day. (Foster, N.T. 23-43). Had this programming been initiated earlier, her self-inflicted injuries might have been avoided or at least lessened.

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[35] One young male resident had a tendency to run away from the institution. When he was given one-to-one interaction with staff, he would not attempt to run away. When the program of one-to-one interaction was dropped due to staff shortages, he again began running away. He was warned that he would be put on a locked ward if his behavior continued, and he became abusive to staff. As a result of this behavior, he was put into a seclusion room. (Foster, N.T. 22-44 to 22-46).

Physical restraints are potentially physically harmful and can create conditions in which physical injuries are more likely to occur (Clements, N.T. 2-87; Hirst, N.T. 7-131; Roos, N.T. 1-166),[36] and prevent residents from learning or exercising self-care skills. (Clements, N.T. 2-87).

Psychotropic drugs at Pennhurst are often used for control and not for treatment, and the rate of drug use on some of the units is extraordinarily high. (Hersh, N.T. 13-153).[37] Dr. Sprague, an expert in psychopharmacology,[38] testifying on behalf of the United States, conducted a survey of 39 residents at Pennhurst, a group which he considered to be statistically representative of the residents at Pennhurst. He found that 51% of the group were receiving psychotropic drugs, 35% of the group were receiving anti-convulsant medication, and 40% were receiving two or more psychotropic drugs at at one time. (N.T. 3-36). In comparison with similar institutions throughout the country, Dr. Sprague stated that these percentages were very high, though he said that some institutions administer comparable levels.[39]

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[36] In 1972, an eleven year old child strangled to death when tied to a chair in "soft" restraints. (Lowrie, N.T. 4-133—4-135).

[37] Until March, 1977, Pennhurst had no written policy against the use of PRN orders ("*pro re nata*" or "as needed") for restraints or seclusion. In its most extreme form, a doctor would prescribe a restraint or seclusion for a patient to be administered in the discretion of a direct care aide or a nurse. (Boyle, N.T. 17-93, 17-94). At best, the doctor would be called prior to administration of the drug, but he or she seldom personally visited the resident either before or shortly after the medication or physical restraint was administered. (Boyle, Deposition at 22).

[38] "Psychopharmacology" is the area of study dealing with prescription medicines that are prescribed for mind alteration for behavior control. (Sprague, N.T. 3-12, 3-13).

[39] Dr. Sprague testified that at a state institution in Georgia serving the most severly retarded individuals, only 25% of the residents were on drugs. (N.T. 3-38).

Dr. Sprague also found that Pennhurst residents on drugs were inadequately monitored. Without monitoring, one cannot determine whether the drug has been effective and whether it should be continued. Dr. Sprague found that in only 29% of the cases in which a drug was administered were its effects on the individual evaluated. (N.T. 3-45). He further testified that the drug practice at Pennhurst does not meet minimally professional standards and is physically hazardous to the residents. (N.T. 3-55, 3-90).

One of the side effects of the use of psychotropic medication is that it may make the individual receiving it lethargic—so much so that the recipient may fall asleep during school, or during other times when activities and/or programming are being attempted. (Lowrie, N.T. 5-22). Other hazardous side effects of these drugs include hypersensitivity to sunlight; ataxia (inability to maintain balance and gait); and gingival hyperplasia (gum tissue condition marked by inflammation, bleeding and increased growth). (Hedson, Deposition at 59-61). Thus, the administration of such drugs actually impedes the habilitation of the resident, especially when used as a control rather than a habilitation device.

D. *Deterioration and Abuse of the Residents at Pennhurst*

The physical environment at Pennhurst is hazardous to the residents, both physically and psychologically. (Clements, N.T. 2-59). There is often excrement and urine on ward floors (Roos, N.T. 1-158; Smith, Deposition at 41), and the living areas do not meet minimal professional standards for cleanliness. (Youngberg, Deposition at 24). Outbreaks of pinworms and infectious disease are common (M. Conley, N.T. 16-193; Lowrie, N.T. 4-153; Hedson, Deposition at 122). As Superintendent Youngberg noted:

> There is not adequate space for [the residents. The living areas do] not provide privacy for those persons who can handle privacy. There does not seem to be adequate activity areas or program areas or even general activity areas within the general living area or even adequate activity program areas away from the home living area. (Deposition at 23).

The environment at Pennhurst is not only not conducive to learning new skills, but it is so poor that it contributes to losing skills already learned.[40] (Clements, N.T. 2-59). For example, Pennhurst has a toilet training program, but one who has successfully completed the program may not be able to practice the newly learned skill, and is therefore likely to lose it. (Clement, N.T. 2-36, 2-37). Moreover, most toilet areas do not have towels, soap or toilet paper,[41] and the bathroom facilities are often filthy and in a state of disrepair. Obnoxious odors and excessive noise permeate the atmosphere at Pennhurst. Such conditions are not conducive to habilitation. (Dybwad, N.T. 7-52). Moreover, the noise level in the day rooms is often so high that many residents simply stop speaking. (Clements, N.T. 2-59).

Meals are eaten in a large group setting. Staff supervision is at a minimum, and residents are often free to steal food from other residents—which results in some residents not getting enough to eat. (Clements, N.T.

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[40] A survey conducted by Dr. Betty Hare revealed that 34% of the individuals in the group surveyed had some notation of regression in their records. (PARC Exhibit 53, Hare, N.T. 8-167). Those "skills" which are learned at Pennhurst are often antisocial. (Roos, N.T. 1-139; Clements, N.T. 2-84).

[41] Direct care aides testified that there was no soap or towels in the toilet areas because when placed there, the residents stuffed them down the toilets. (Roy, N.T. 15-108). These same aides also testified, however, that no programming had been conducted to try to negate this behavior. (*Id.*, N.T. 15-127).

2-73). Obviously, diet control in such an environment is almost impossible.

Injuries to residents by other residents, and through self-abuse, are common. For example, on January 8, 1975, one individual bit off three-quarters of the earlobe and part of the outer ear of another resident while the second resident was asleep. (Matthews, Deposition at 83). About this same period, one resident pushed a second to the floor, resulting in the death of the second resident. (Barton, Deposition at 67, 68). Such resident abuse of residents continues. In January, 1977, alone, there were 833 minor and 25 major injuries reported.[42] (Youngberg, Deposition at 83).

In addition, there is some staff abuse of residents. In 1976, one resident was raped by a staff person (Ruddick, N.T. 3-115 to 3-117); one resident was badly bruised when a staff person hit him with a set of keys (Barton, Deposition at 40); another resident was thrown several feet across a room by a staff person (Ruddick, N.T. 3-113; Caranfa, N.T. 12-79); and one resident was hit by a staff person with a shackle belt (Bowman, N.T. 13-83; Pirmann, N.T. 19-94). On each occasion, an investigation was conducted and the staff person responsible was suspended and/or terminated (Ruddick, N.T. 3-114; Bowman, N.T. 13-82, 13-83, 13-84; Pirmann, N.T. 19-94).

Many of the residents have suffered physical deterioration and intellectual and behavioral regression during their residency at Pennhurst. Terri Lee Halderman, the original plaintiff in this action, was admitted to Pennhurst in 1966 when she was twelve years of age. During her eleven years at Pennhurst, as a result of attacks and accidents, she has lost several teeth and suffered a fractured jaw, fractured fingers, a fractured toe and num-

[42] This figure includes injuries due to self-abuse and to accidents.

erous lacerations, cuts, scratches and bites.[43] Prior to her admission to Pennhurst, Terri Lee could say "dadda", "mamma", "noynoy" (no), "baba" (goodby) and "nana" (grandmother). She no longer speaks. (Halderman, N.T. 9-69, 9-71, 9-78, 9-87, 9-88).

Plaintiff Charles DiNolfi was admitted to Pennhurst when he was nine years old; he is now forty-five and has resided at the institution continually except for short stays at White Haven State School and Hospital. (Hunsicker, N.T. 9-39). Dorothy Hunsicker, his sister, testified that whenever she or her family visited him, Mr. DiNolfi had some type of bandage on. (*Id.*) Twenty-six years ago, while at Pennhurst, Mr. DiNolfi lost an eye. A Pennhurst physician told Ms. Hunsicker that Mr. DiNolfi slipped while taking a shower, and hit the spigot with his eye. The sight in his remaining eye has been impaired due to injury. (*Id.*, N.T. 9-46, 9-47). He has only a few teeth remaining and his nose has been battered. (*Id.*, N.T. 9-41).

Plaintiffs Robert and Theresa Sobetsky were admitted to Pennhurst on November 29, 1971.[44] They were placed on extremely overcrowded wards where beds were placed in the aisles. Robert was never assigned to a particular bed. (Sobetsky, N.T. 9-145, 9-146). During his residency at Pennhurst, Robert Sobetsky suffered from bruises, bites, scratches, welts and he smelled of urine. (*Id.*, N.T. 9-147, 9-148). His record shows a number of reported injuries, some of which, though labeled minor injuries, represented bruises that were three tc five inches in length. (*Id.*, 9-151, 9-152). Theresa also suffered such injuries. (*Id.*, N.T. 9-148).

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[43] Terri Lee Halderman's medical records contain a listing of over forty reported injuries.

[44] Since January, 1976, they have been residing at Woodhaven, a Pennsylvania institution for the mentally retarded run by Temple University.

Plaintiff Robert Hight, born in 1965, was admitted to Pennhurst in September, 1974. He was placed on a ward with forty-five other residents. His parents visited him two and one-half weeks after his admission and found that he was badly bruised, his mouth was cut, he was heavily drugged and did not recognize his mother. On this visit, the Hights observed twenty-five residents walking the ward naked, others were only partially dressed. During this short period of time, Robert had lost skills that he had possessed prior to his admission. The Hights promptly removed Robert from the institution, Mrs. Hight commenting that she "wouldn't leave a dog in conditions like that." (N.T. 11-22, 11-23).

Plaintiff George Sorotos entered Pennhurst in 1970 at the age of seven. In the seven years that George has been at Pennhurst, his former foster mother, Marion Caranfa,[45] testified that in her weekly visits to Pennhurst there have been only four occasions when George was not injured. (N.T. 12-63). During this period, he has suffered from numerous reported injuries, including bites, scratches, black eyes and loss of teeth. In addition, Mrs. Caranfa testified that she recently observed what appeared to be cigarette burns on George's chest. (N.T. 12-65).

Plaintiffs Larry and Kenny Taylor entered Pennhurst on February 28, 1961. In the early 1970's, Mrs. Taylor questioned the staff about the medication being given to Larry. He was very lethargic, falling asleep at school and barely able to walk. (Taylor, N.T. 13-24). The physician in charge of Larry's unit, checked Larry's medical record and found that he was on dilantin, a drug

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[45] The Caranfas were made George Sorotos' foster parents when he was six weeks old. Sometime after he entered Pennhurst, the agency which had supervision over George removed them as his foster parents. They still consider him as one of their family and have continued their visits. (Caranfa, N.T. 12-62, 12-105).

used to control epileptic seizures. Mrs. Taylor testified that Larry had had only one seizure that she knew of and that had been when he was a baby. Larry was removed from dilantin and placed on mellaril, a psychotropic drug. This, too, made him lethargic. (*Id.*, N.T. 13-26 to 13-28). Larry and Kenny were transferred to Woodhaven in 1975 where Mrs. Taylor testified that Larry does not receive any psychotropic medication, and is able to walk independently. (*Id.*, N.T. 13-32). Larry was often injured while at Pennhurst; on one occasion, he was hospitalized for two weeks because of head and face injuries he received as a result of a beating by another resident. (*Id.*, N.T. 13-30). Kenny, too, suffered serious injuries while at Pennhurst. (*Id.*, 13-29).

Plaintiff Nancy Beth Bowman entered Pennhurst at the age of ten in 1961. She was placed on a large ward which had sixty-five residents and often only two child-care aides in attendance. (Bowman, N.T. 13-71; Pirmann, N.T. 19-89). During her residency at Pennhurst she developed maladaptive behavior, *i.e.*, biting and pushing. (Bowman, *Id.*). As a result of this maladaptive behavior she has been placed in seclusion for days at a time. (*Id.* N.T. 13-71). While at Pennhurst, she has lost teeth, been badly bruised and has been abused by the staff. (*Id.*, N.T. 13-72, 13-73, 13-81). When asked about her present physical condition Nancy Beth's mother replied, "Nancy Beth will be scarred for the rest of her life." (*Id.*, N.T. 13-49).

Plaintiff Linda Taub, who is blind in addition to being retarded, was admitted to Pennhurst in 1966 at the age of fifteen. According to her father, during her nine year residency at Pennhurst Linda received only custodial care and she experienced regression rather than growth. (Taub, N.T. 2-170). Time on the ward was spent sitting and rocking, with few activities. (*Id.*, N.T. 2-155). During one of their visits in 1968, Linda's parents found Linda, a person capable of walking, strapped to a wheel-

chair by a straightjacket. A staff member explained that by strapping her into the chair, they would know exactly where Linda was. (*Id.*, N.T. 2-152, 2-153). While at the institution, Linda was badly bruised and scarred. (*Id.*, N.T. 2-164).

E. *Voluntariness*

Approximately 21 of the 45 living units at Pennhurst are locked (Matthews, Deposition at 34) to prevent individuals from leaving their living units. (Uphold, Deposition at 139). Those individuals over the age of 18 who have been "voluntarily" admitted to Pennhurst are theoretically free to leave the institution at any time. (Allen, N.T. 21-185). Those admitted on the petition of their parents are informed by their case-worker when they reach the age of 18 that they do not have to remain at Pennhurst. If the residents state that they wish to leave the institution and the staff determines that there is no place for them in the community, or believes that the individuals are not ready to go into the community, the staff will petition the courts to have the individuals committed to the institution by a court. (*Id.*, N.T. 21-186, 21-205). Furthermore, those residents who either do not understand their alternatives, or are physically unable to indicate that they wish to leave Pennhurst, will be deemed to have consented to their continued placement at the institution. (*Id.*, N.T. 21-210). Thus, the notion of voluntariness in connection with admission as well as in connection with the right to leave Pennhurst is an illusory concept. Few if any residents now have, nor did they have at the time of their admission, any adequate alternative to their institutionalization. As a practical matter, Pennhurst was and is their only alternative.[46]

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[46] Nearly all the parents of Pennhurst, residents who testified stated that they placed their children in Pennhurst only as a last resort, and had there been community facilities or aid programs, their children would not have been placed at Pennhurst. (Sobetsky, N.T. 9-142; Hight, N.T. 11-21).

F. *Community Services in the Five County Area*

Since the early 1960's there has been a distinct humanistic renaissance, replete with the acceptance of the theory of normalization for the habilitation of the retarded. Mason & Menolascino, *supra* note 6, at 136. The principles of normalization are an outgrowth of studies showing that those in large institutions suffered from apathy, stunted growth and loss in I.Q., and that the smaller the living unit on which the retarded individual lived, the higher the level of behavioral functioning shown by the individual. (Roos, N.T. 1-96 to 1-104). Under the principles of normalization, the retarded individual is treated as much like the non-retarded person as possible. (*Id.*, N.T. 1-106, 1-107). The basic tenet of normalization is that a person responds according to the way he or she is treated. (Glenn, N.T. 5-186, 5-187). The thrust of habilitation through normalization is the remediation of the delayed learning process so as to develop the maximum growth potential by the acquisition of self-help, language, personal, social, educational, vocational and recreation skills. Mason & Menolascino, *supra* note 6, at 139-140. The older theories of habilitating the retarded stressed protecting the individual, and were characterized by little expectation of growth. Given this lack of expectation, the individual rarely exhibited growth. However, once removed from depressing, restrictive routines, the retarded have been able to accomplish a great deal. (Dybwad, N.T. 7-160).[47]

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[47] Mrs. Grace Auerback testified concerning the changes she has observed in her son, Sid, since his transfer from Pennhurst into a community home in 1973. While at Pennhurst, he was subdued and never talked; now, she testified, you cannot stop him. He is now able to cook, work and keep his own bank account. She testified that Sid had learned more in the last 3½ years while in the community than he had in the 38 years that he had resided at Pennhurst. (N.T. 8-47, 8-48, 8-49, 8-51).

The environment at Pennhurst is not conducive to normalization. It does not reflect society. It is separate and isolated from society and represents group rather than family living. (Hirst, N.T. 7-124). The principles of normalization have been accepted by the administration of Pennhurst and by the Department of Public Welfare, which is responsible for the administration of programs for the retarded in the five county area (Youngberg, N.T. 22-171; Rice, N.T. 26-43 to 26-45; Bilyew, N.T. 24-13; Hirst, N.T. 7-120), and the current intention of the Department of Public Welfare is to transfer all residents from Pennhurst by the early 1980's. (Rice, N.T. 28-48).

The five county area (Bucks, Chester, Delaware, Montgomery and Philadelphia) has some community facilities providing for the education, training and care of the retarded covering all ages of retardation, including the profoundly retarded with multiple handicaps. (Girardeau, N.T. 4-140, 4-141). These community facilities have been an outgrowth of the acceptance of the principle of normalization and the rejection of institutions such as Pennhurst in connection with the habilitation of the retarded.

Many individuals now living at Pennhurst could be moved immediately into the community and would be able to cope with little or no supervision. (Settle, N.T. 6-126; Hirst, N.T. 7-116). All the parties in this litigation are in agreement that given appropriate community facilities, all the residents at Pennhurst, even the most profoundly retarded with multiple handicaps, should be living in the community. (Dybwad, N.T. 7-68).

The primary limiting factor in the transfer of Pennhurst residents to community facilities has been the failure of the Commonwealth and its subdivisions to provide sufficient living units, vocational and day care facilities and other support services at the community level.

Since fiscal year 1972, only 186 Pennhurst residents have been transferred from the institution directly into community living units (Bilyew, N.T. 24-50); although 176 others were transferred from Pennhurst to other institutions during 1974 and 1975. (Clark, N.T. 21-170).

In November, 1970, Act 256 was signed by the Governor of Pennsylvania. This legislation appropriated twenty-one million dollars for the purpose of planning, designing and constructing community facilities which would enable 900 Pennhurst residents to be transferred to the community. In 1971, the McDowell report was prepared at a cost of $68,000. It detailed the programs and services needed to support the 900 Pennhurst residents in the community and provided a blueprint for the implementation of the Act. (Samuels, N.T. 23-9, 23-10, 23-55). Though seven years have passed since the Act was signed, few of the facilities have become operational. The Department of Public Welfare now expects this program to be completed by 1980. (*Id.*, N.T. 23-44). Over eighteen million dollars of this fund remains unspent but is allocated to building these facilities. (Stipulation, N.T. 7-97). As of April 25, 1977, however, only 37 Pennhurst residents have directly benefited from the Act. (Samuels, N.T. 23-80).

Comparable facilities in the community are generally less expensive than large isolated state institutions. Services can be purchased at regular rates, rather than at rates which must be paid to attract individuals to work in a setting like Pennhurst. (Conley, N.T. 11-107). The cost of running Pennhurst in 1976 was $27.8 million dollars, or $60 per resident per day. (*Id.*, N.T. 12-28). This does not include the fair rental value of the buildings at Pennhurst (estimated at $3-$4 per resident per day). (*Id.*, N.T. 11-114). The statewide cost of community living arrangements in Pennsylvania for 1976 was $17.64 per individual per day. (PARC Exhibit 63,

64). Program services, which ⅓ of mentally retarded individuals would need, average approximately $10 per individual per day. (Conley, N.T. 11-116, 11-117). Moreover, keeping the retarded individual in the community makes it possible for him or her to get employment. Eighty-five percent of the mentally retarded can be employed, though not all are capable of competitive employment. (Settle, N.T. 7-4). The lifetime earnings of a mildly retarded individual often exceeds $500,000. (Conley, N.T. 12-21). For those with an I.Q. between 25 and 50, 45% of men and 12% of women earn about 20% of the average wage. (*Id.*, N.T. 12-31). When the retarded can work, the amount of financial support which society must provide decreases and the individuals may benefit society with the taxes they pay. Furthermore, the investment per individual at Pennhurst is primarily for warehousing and not for the individual's well-being or future planning, as is the case with community facilities. (*Id.*, N.T. 11-23, 11-24).

G. *County Participation*

The counties presently have a financial incentive to send their retarded to Pennhurst rather than provide them with habilitation within the community. When a retarded individual is placed in a state institution, such as Pennhurst, the Commonwealth pays 100% of the costs incurred in the habilitation of the individual. However, if the individual receives services within the community, the county must provide 10% of the funds necessary to provide some of the services.

Every mentally retarded individual within the Commonwealth is assigned to a Base Service Unit (BSU) which is the county unit responsible for arranging community and institutional placements and for coordinating services for the individual. (Rice, N.T. 25-67). Pennhurst residents are assigned to a BSU either on the basis

of where they resided prior to admission to the institution, or where their family presently resides. Almost all of the parents of Pennhurst residents who testified stated that they had little or no contact with their child's BSU. (Hunsicker, N.T. 9-49; Taylor, N.T. 13-30). The BSU's are invited to attend their residents' annual program review, but almost never do. (Roy, N.T. 15-134; Hare, N.T. 8-176). The BSU's often fail to investigate the least restrictive alternative for the retarded individual under their charge. Placement at Pennhurst is often the only alternative presented to the committing judge at court commitment proceedings.[48]

The BSU's have been doing little to prepare Pennhurst residents to leave Pennhurst. Although the Pennsylvania Department of Public Welfare, Pennhurst staff and county officials are in complete agreement that the residents of Pennhurst should be transferred as soon as practicable to appropriate community facilities, apparently no one has taken the initiative to accomplish this objective. (Hersh, N.T. 13-136).

The five county defendants are not in compliance with the Commonwealth's Community Living Arrangement (CLA) policy that at least 50% of the residents for these living facilities must be drawn from institutions. In contrast to other regions in the state, the counties which Pennhurst serves have a lower percentage of CLA residents drawn from institutions than from the community. (Knowlton, Deposition at 52).

IV. *The Merits*

This case concerns the constitutional and statutory rights of retarded persons institutionalized at Pennhurst.

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[48] One Philadelphia BSU made a referral to Pennhurst for a child it had decided needed a structured environment with one-to-one interaction, even though it knew that the individual would not receive such individualized treatment at Pennhurst. (Cooper, N.T. 29-74).

Our discussion herein pertains to the retarded, individuals who, because of circumstances beyond their control, are unable to function at the same educational and behavioral levels as the rest of society. It concerns solely the retarded and not persons who are mentally or emotionally ill. These are individuals who have not broken any laws, carry no contagious disease and are not in any way a danger to society. If anyone is in need of training, education and care, they are. At issue is whether the Commonwealth's system of incarcerating the retarded in an institution known as Pennhurst in any way violates their constitutional or statutory rights.

Having concluded the trial phase of the liability portion of this litigation, it has become apparent that by and large the parties share the same goals: all desire to improve the education, training and care provided the retarded in Pennsylvania and believe that Pennhurst should be closed and that all the residents should be educated, trained and cared for in the community. All agree that institutions such as Pennhurst are inappropriate and inadequate for the habilitation of the retarded. Defendants agree with plaintiffs' contention that the habilitation provided Pennhurst residents does not meet minimally acceptable professional standards. The Commonwealth in recent years has been attempting to upgrade Pennhurst and the education, training and care provided therein to its retarded residents. Moreover, the Pennsylvania Department of Public Welfare's current plans call for the transfer of all Pennhurst residents from the institution into the community (though perhaps temporarily into other institutions) by the early 1980's. Defendants contend, however, that they are neither constitutionally nor statutorily mandated to make these transfers or to upgrade the care, education and training provided at Pennhurst. It is their position that no constitutional or statutory rights have been violated. We disagree. Moreover,

defendants' plans to upgrade and eventually close Pennhurst have little, if any, bearing on the issue of whether the statutory or constitutional rights of Pennhurst's retarded residents have been, or are being, violated. As the court in *Welsch* v. *Likins*, 373 F.Supp. 487, 498 (D. Minn. 1974), *aff'd in part, vacated and remanded in part*, 550 F.2d 1122 (8th Cir. 1977), stated:

> good faith is not at issue here. "[R]ather the issue is of the protection of the constitutional rights" of the residents. . . It does not suffice, therefore, to show that conditions have been upgraded at [the institution], that the situation will continue to improve in the future, and that even more achievements would be forthcoming were it not for the restrictions imposed by the legislature. It is the Court's duty, under the Constitution, to assure that every resident of [the institution] receives at least minimally adequate care and treatment consonant with the full and true meaning of the due process clause.

A. *Constitutional Right to Minimally Adequate Habilitation*

The Supreme Court has not as yet stated that the retarded have a constitutional right to habilitation. It has, however, discussed the right to treatment of the mentally ill. *O'Connor* v. *Donaldson*, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975). Donaldson had been civilly committed to a state mental hospital in 1957 and had remained there involuntarily for nearly fifteen years. Repeatedly, but without success, he had demanded his release, contending that he was neither dangerous nor mentally ill, and that even if he were mentally ill, that he should be released since the hospital had not provided him with treatment for his illness. The *Donaldson* holding is very narrow: "a State cannot constitutionally confine without more a nondangerous individual who is

capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends." *Id.* at 576, 95 S.Ct. at 2494.

Donaldson allegedly was suffering from "paranoid schizophrenia", *id.* at 565, 95 S.Ct. 2486, and was not retarded. When dealing with the retarded, the concern is for "habilitation" rather than for "treatment".[49]

> The use of the concept "habilitation" instead of "treatment" in the context of mental retardation reflects an awareness that "mental illness" is not synonymous with "mental retardation." Mental illness concerns an inability to cope with one's environment regardless of intellectual level. Mental illness can occur at any stage of life while mental retardation is considered to be a developmental disability beginning in the early years.

Mason & Menolascino, *supra* note 6, at 147 n. 72 (1976). Although we are convinced that the concept of "habilitation" for the retarded and "treatment" for the mentally and emotionally ill are separate and distinct concepts which should never be confused, in dealing with the question of the right of the retarded to adequate habilitation one must consider, to the extent applicable, those cases which deal with the right to treatment of the mentally ill.[50]

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[49] Often, those courts which have dealt with mentally ill and retarded individuals have blurred the issues involved. The "right to treatment" is frequently used in conjunction with the retarded, when in fact, these individuals are not in need of medical treatment, but of education and training. In part, this blurring is due to the fact that some of the cases involved several facilities, some for the retarded and some for the mentally ill, *see, e.g., Wyatt* v. *Stickney*, 325 F.Supp. 781 (M.D.Ala. 1971) (mentally ill), 344 F.Supp. 387 (M.D.Ala. 1972) (retarded), and others involved a single facility serving both retarded and mentally ill individuals, *see e.g., Davis* v. *Watkins*, 384 F.Supp. 1196 (N.D.Ohio 1974).

[50] Of course, as the Supreme Court has noted, "careful attention must be paid to the differences between mentally ill and mentally

A great deal of scholarly and judicial attention has been focused on the question of a constitutional right to treatment and habilitation since Dr. Morton Birnbaum's seminal work, *The Right to Treatment*, 46 A.B.A.J. 499 (1960).[51]

Rouse v. *Cameron*, 125 U.S.App.D.C. 366, 373 F.2d 451 (1966), was one of the first federal cases to deal with the right to treatment. Rouse had been involuntarily committed to a mental hospital following his acquittal by reason of insanity of a misdemeanor for which the

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retarded . . . ." *Kremens* v. *Bartley*, 431 U.S. 119, 135, 97 S.Ct. 1709, 1718, 52 L.Ed.2d 184 (1977). However, as one court has noted: "[i]n the context of the rights to appropriate care for people civilly confined to public mental institutions, no viable distinction can be made between the mentally ill and the mentally retarded." *Wyatt* v. *Stickney*, 344 F.Supp. 387, 390 (M.D.Ala. 1972), *aff'd in part, rev'd in part and remanded in part sub nom. Wyatt* v. *Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

[51] Dr. Birnbaum wrote:

> It is proposed . . . that the court under their traditional powers to protect the constitutional rights of our citizens begin to consider the problem of whether or not a person who has been institutionalized solely because he is sufficiently mentally ill to require institutionalization for care and treatment actually does receive adequate medical treatment so that he may regain his health, and therefore his liberty, as soon as possible; that the courts do this by means of recognizing and enforcing the right to treatment; and, that the courts do this independent of any action by any legislature, as necessary and overdue development of our present concept of due process of law. 46 A.B.A.J. at 503.

See, e.g.: Mason & Menolascino, *supra* note 6; *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 Harv.L.Rev. 1190 (1974); *Herr, Civil Rights, Uncivil Asylums and the Retarded*, 43 Cin.L.Rev. 679 (1974); Drake, *Enforcing the Right to Treatment; Wyatt* v. *Stickney*, 10 Amer.Crim.L.Rev. 587 (1972); Case Comment, *Wyatt* v. *Stickney and the Right of Civilly Committed Mental Patients to Adequate Treatment*, 86 Harv.L.Rev. 1282 (1973); Note, *The Wyatt Case: Implementation of a Judical Decree Ordering Institutional Change*, 84 Yale L.J. 1338 (1975); Hoffman and Dunn, *Beyond* Rouse *and* Wyatt: *An Administrative-Law Model for Expanding and Implementing the Mental Patient's Right to Treatment*, 61 Va.L.Rev. 297 (1975).

maximum term of imprisonment was one year. Rouse filed a petition for habeas corpus which the district court denied, contending that he had a right to be released if he was not accorded adequate treatment. Although the Circuit Court reversed on the basis of a District of Columbia statute, Chief Judge Bazelon stated that "involuntary confinement without treatment is 'shocking' ", *id.* 125 U.S.App.D.C. at 370, 373 F.2d at 455, and noted that the purpose of involuntary hospitalization is treatment and not punishment. *Id.* 125 U.S.App.D.C. at 367, 373 F.2d at 452. He pointed out that a statute which provides for the mandatory commitment of an individual acquitted of a criminal offense by reason of insanity is permissible only because of its "humane therapeutic goals," and concluded that if treatment were not required under the statute, the statute might violate the Due Process, Equal Protection and Cruel and Unusual Punishment Clauses of the Constitution. *Id.* 125 U.S.App.D.C. at 368, 373 F.2d at 453.

Civil commitment entails a "massive curtailment of liberty". *Humphrey* v. *Cady*, 405 U.S. 504, 509, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972). The only permissible justification for committing the mentally ill are: (1) danger to the individual, (2) danger to others, and (3) need for treatment. *Jackson* v. *Indiana*, 406 U.S. 715, 737, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972); *Wyatt* v. *Aderholt*, 503 F.2d 1305, 1312 (5th Cir. 1974). Although this Court entertains serious doubts as to whether retarded individuals should ever be subjected to "commitment", there is no doubt that under the present case law, the only possible justification for committing the retarded to an institution such as Pennhurst is to provide them with habilitation, *i.e.*, education, training and care. Failure to provide adequate habilitation may well mean commitment for the life of the retarded individual. *Welsch* v. *Likins*, 373 F.Supp. 487, 497 (D.Minn.1974), *aff'd in part and vacated and remanded in part*, 550 F.2d 1122 (8th Cir.

1977). In fact, at Pennhurst the average residency is twenty-one years.

Moreover, as the Court stated in *Jackson* v. *Indiana*, 406 U.S. at 738, 92 S.Ct. at 1858, "[a]t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purposes for which the individual is committed." Since the only justifiable purpose for the commitment of the retarded is habilitation, if habilitation is not provided, the nature of the commitment bears no reasonable relation to its purpose and the individual's due process rights have been violated. *Wyatt* v. *Aderholt*, 503 F.2d 1305, 1312 (5th Cir. 1974); *Donaldson* v. *O'Connor*, 493 F.2d 507, 521 (5th Cir. 1974), *vacated*, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975).[52]

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[52] As heretofore pointed out, the Supreme Court's decision in *Donaldson* was very narrow; the Court did not pass upon the issue of the right to treatment or habilitation. The Court vacated the Fifth Circuit's broad holding and stated: "[o]f necessity our decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect, leaving this Court's opinion and judgment as the sole law of the case." 422 U.S. 563, 577 n. 12, 95 S.Ct. 2486, 2495, 45 L.Ed.2d 396 (1975). Prior to the Supreme Court's decision, the Fifth Circuit rendered a second right to treatment decision which relied heavily on its *Donaldson* opinion, *Wyatt* v. *Aderholt*, 503 F.2d 1305 (5th Cir. 1974), which like *Donaldson* was authored by Judge Wisdom. At least one commentator suggests "that *Wyatt* is still good law, thus leaving the right to treatment issue where it was before." *"What More": A Constitutional Right to Treatment?* 22 Loyola L.Rev. 373, 383 (1976). In support of this proposition, it should be noted that four days after deciding *Donaldson*, the Supreme Court denied *certiorari* in yet another Fifth Circuit right to treatment case. *The Department of Human Resources of the State of Georgia* v. *Burnham*, 422 U.S. 1057, 95 S.Ct. 2680, 45 L.Ed.2d 709 (1975). In *Burnham*, the district court had found that there was no constitutional right to treatment. 349 F.Supp. 1335 (N.D.Ga. 1972). The Fifth Circuit reversed on the basis of its *Donaldson* and *Aderholt* decisions. 503 F.2d 1319 (5th Cir. 1974). Even though the Supreme Court had vacated the *Donaldson* decision only four days before, it denied *certiorari* in *Burnham*, apparently allowing *Aderhalt*, with its holding of a constitutional right to treatment to remain as the law of the Fifth Circuit.

In *Robinson* v. *California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962), the Supreme Court held that incarceration solely on the basis of an individual's status constitutes cruel and unusual punishment. (Robinson was convicted of being a narcotics addict.) As was pointed out in *Welsch*:

> *because plaintiffs* [retarded individuals] have not been guilty of any criminal offenses against society, treatment is the only constitutionally permissible purpose of their confinement, regardless of procedural protections under the governing civil commitment statute. . . . This argument rests upon the Eighth and Fourteenth Amendments, relying principally upon the Supreme Court's decision in *Robinson* v. *California* . . . The plaintiffs in the instant action are not criminals; they are victims of uncontrollable "status."
>
> If they are subject to "detention for mere illness—without a curative program," . . . plaintiffs will be within the ambit of the *Robinson* proscription.

373 F.Supp. at 496. Thus, commitment of the retarded can withstand constitutional scrutiny only when it is coupled with minimally adequate habilitation. *See United States* v. *Jackson*, 179 U.S.App.D.C. 375, 385, 553 F.2d 109, 119 (1976).

Of the federal courts which have considered the right to habilitation issue in connection with involuntarily committed retarded individuals and the right to treatment of involuntarily committed mentally or emotionally ill individuals, only two reported cases have been called to our attention which denied the existence of such a constitutional right: *Burnham* v. *Department of Public Health of the State of Georgia*, 349 F.Supp. 1335 (N.D. Ga.1972), and *New York State Ass'n for Retarded Children, Inc.* v. *Rockefeller*, 357 F.Supp. 752 (E.D.N.Y.

1973). *Burnham* was reversed by the Fifth Circuit, 503 F.2d 1319 (5th Cir. 1974), *cert. denied*, 422 U.S. 1057, 95 S.Ct. 2680, 45 L.Ed.2d 709 (1975), and the *Rockefeller* court in approving a consent decree in that action appeared to be questioning its earlier finding of no constitutional right to treatment:

> Somewhat different legal rubrics have been employed in [the *Donaldson, Wyatt* line of] cases—"protection from harm" in this case and "right to treatment" and "need for care" in others. It appears that there is no bright line separating these standards. In the present posture of this case, there is no need for the court to re-examine the constitutional standard properly applicable to Willowbrook's residents. The relief which the parties agreed to will advance the very rights enunciated in the case law since this court's 1973 ruling.

New York State Ass'n for Retarded Children, Inc. v. *Carey*, 393 F.Supp. 715, 719 (E.D.N.Y.1975).

The other courts which have examined the issue have all found a constitutional right to treatment or habilitation. *See, e.g., Wyatt* v. *Aderholt*, 503 F.2d 1305 (5th Cir. 1974); *Donaldson* v. *O'Connor*, 493 F.2d 507 (5th Cir. 1974), *vacated* 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975); *Gary W.* v. *Louisiana*, 437 F.Supp. 1209 at 1219, (E.D.La.), *modified*, October 28, 1976 (involuntarily committed retarded children have a constitutional right "to a program of treatment that affords the individual a reasonable chance to acquire and maintain those life skills that enable him to cope as effectively as his own capacities permit with the demands of his own person and of his environment and to raise the level of his physical, mental and social efficiency"); *Woe* v. *Mathews*, 408 F.Supp. 419, 429 (E.D.N.Y. 1976), *remanded in part*,

dismissed in part sub nom. Woe v. *Weinberger*, 556 F.2d 563 (2d Cir. 1977) ("[a]s a tentative formulation it would seem encumbent upon the State as confiner . . . to employ whatever means are necessary, including such case and treatment as are reasonably possible in the circumstance of the case, to promote the speedy release and return to liberty of the person confined."); *Davis* v. *Watkins*, 384 F.Supp. 1196, 1197 (N.D.Ohio 1974) (the court, dealing with a state facility apparently serving both mentally ill and retarded individuals held that "the State, upon committing an individual 'until he regains his sanity', incurs a responsibility to provide such care as is reasonably calculated to achieve that goal."); *Saville* v. *Treadway*, 404 F.Supp. 430 (M.D.Tenn.1974) (three-judge court), consent agreement approved, 404 F.Supp. 433 (retarded individuals in state institutions have right to habilitative services); *Welsch* v. *Likins*, 373 F.Supp. F.Supp. 487 (D.Minn.1974), *aff'd in part and vacated and remanded in part*, 550 F.2d 1122 (8th Cir. 1977) (retarded individuals involuntarily committed to state institutions have a constitutional right to treatment).

The Third Circuit has not yet decided the right to treatment or habilitation question. However, in *Scott* v. *Plante*, 532 F.2d 939, 947 (1976) it reversed a district court's F.R.Civ.P. 12(b)(6) dismissal of a right to treatment claim by an involuntarily committed mentally ill patient, stating:

> The Supreme Court did not reach the issue in *O'Connor* v. *Donaldson, supra.* Nor has this court considered it. It is not the kind of issue, however, which we should attempt to resolve definitively on the record that is before us. . . . It suffices for present purposes to say that it does not appear to a certainty that Scott would be entitled to no relief on his right to treatment claim under any state of facts he could

prove in support of that claim. Thus, a Rule 12(b)(6) dismissal was improper.[53]

We hold that when a state involuntarily commits retarded persons, it must provide them with such habilitation as will afford them a reasonble opportunity to acquire and maintain those life skills necessary to cope as effectively as their capacities permit. *See Gary W.* v. *Louisiana*, 437 F.Supp. 1209 at 1219, (E.D.La.), *modified*, October 28, 1976. On the basis of the evidence presented in these proceedings, we find that the retarded residents of Pennhurst have not received, and are not receiving, minimally adequate habilitation. Furthermore, on the basis of this record we find that minimally adequate habilitation cannot be provided in an institution such as Pennhurst. As the Court has heretofore found, Pennhurst does not provide an atmosphere conducive to normalization which is so vital to the retarded if they are to be given the opportunity to acquire, maintain and improve their life skills. Pennhurst provides confinement

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[53] The constitutional right to treatment and habilitation has been extended to include other classes of involuntarily committed non-criminal offenders. *See, e.g., McRedmond* v. *Wilson*, 533 F.2d 757 (2d Cir. 1976) (wayward juveniles who have been institutionalized have a constitutional right to treatment); *Nelson* v. *Heyne*, 491 F.2d 352, 358 (7th Cir.), *cert. denied*, 417 U.S. 976, 94 S.Ct. 3183, 41 L.Ed.2d 1146 (1974) (juveniles who were involuntarily committed—one-third for non-criminal offenses—to a correctional institution have a constitutional right to rehabilitative treatment); *Pena* v. *New York State Division for Youth*, 419 F.Supp. 203, 207 (S.D.N.Y. 1976) ("this court finds that the detention of a youth under a juvenile justice system *absent provision for the rehabilitative treatment of such youth* is a violation of due process rights guaranteed under the Fourteenth Amendment."); *see also, Morgan* v. *Sproat*, 432 F.Supp. 1130, 1136 (S.D.Miss. 1977); *Morales* v. *Turman*, 383 F.Supp. 53, 124 (E.D.Tex. 1974), *rev'd on other grounds*, 535 F.2d 864 (5th Cir. 1976), *judgment of Court of Appeals rev'd and remanded*, 430 U.S. 322, 97 S.Ct. 1189, 51 L.Ed.2d 368 (1977); *Inmates of Boys' Training School* v. *Affleck*, 346 F.Supp. 1354, 1372 (D.R.I. 1972); *Stachulak* v. *Coughlin*, 364 F.Supp. 686 (N.D.Ill. 1973); and *Martarella* v. *Kelley*, 349 F.Supp. 575, 600 (S.D.N.Y. 1972).

and isolation, the antithesis of habilitation. We found that Pennhurst has produced regression and in many instances has destroyed life skills possessed by its retarded residents at the time of their admission.[54] We are inclined to agree with the following comments of Mason & Menolascino, *supra* note 6, at 156-7 (footnotes omitted):

> Although *Wyatt* and *Welsch* are significant in their recognition of the principles of normalization and the developmental model for the factual foundation of their formulation of the constitutional right to habilitation, their approach can be considered only the rudimentary beginning. The logic of normalization and the developmental model which *Wyatt* and *Welsch* recognized suggests full implementation of habilitation can only be achieved in a non-institutional setting. Institutions, by their very structure—a closed and segregated society founded on obsolete custodial models—can rarely normalize and habilitate the mentally retarded citizen to the extent of community programs created and modeled upon the normalization and developmental approach components of habilitation. Neither *Wyatt* nor *Welsch* fully implemented the right to habilitation in that they failed to challenge the very existence of the institution. Consequently, the two institutional characteristics most antithetical to the application of the normalization principle remain intact: segregation from the community and the total sheltering of retarded citizens in all spheres of their lives.

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[54] There has been no evidence introduced that any of the plaintiffs were committed to Pennhurst because they posed a danger to society, and, thus, we are not faced with that issue in this case. Moreover, as we have heretofore pointed out, the retarded pose no danger of physical harm to society. Retarded individuals who suffer from emotional and mental problems may pose a danger to society; however, these are due to mental and emotional problems which do not come within the purview of this opinion.

We wish to make it clear that our finding that the retarded at Pennhurst are being deprived of their constitutional right to minimally adequate habilitation is not limited to those residents who were court committed. Nearly fifty percent of the residents at Pennhurst did not go through court commitment procedures. They have been, and are being, deprived of minimally adequate habilitation to the same extent as those who were court committed. Moreover, as we have heretofore found, voluntariness in connection with admission and exit from Pennhurst is an illusory concept. The record in this case shows that Pennhurst residents had no practical alternative at the time of their admission and at the present time, they have no place else to go.

No constitutional mandate has been called to our attention which would require a state to provide habilitation for its retarded citizens. However, whenever a state accepts retarded individuals into its facilities, it cannot create or maintain those facilities in a manner which deprives those individuals of the basic necessities of life. In the case of the retarded, this constitutes an obligation to provide them with minimally adequate habilitation. *See Welsch* v. *Likins*, 550 F.2d 1122, 1132 (8th Cir. 1977); *Nelson* v. *Heyne*, 491 F.2d 352, 360 (7th Cir.), *cert. denied*, 417 U.S. 976, 94 S.Ct. 3183, 41 L.Ed.2d 1146 (1974); *Vanderzeil* v. *Hudspeth*, No. J76-262(R) at 6 (S.D.Miss., filed February 11, 1977).

Once admitted to a state facility, the residents have a constitutional right to be provided with minimally adequate habilitation under the least restrictive conditions consistent with the purpose of the commitment. *Eubanks* v. *Clarke*, 434 F.Supp. 1022, 1028, (E.D.Pa.1977); *J. L.* v. *Parham*, 412 F.Supp. 1112, 1139 (M.D.Ga.1976) (three-judge court), *appeal pending* 431 U.S. 936, 97 S.Ct. 2647, 53 L.Ed.2d 253 (1977); *Gary W.* v. *Louisiana*, 437 F.Supp. 1209, (E.D. La.), *modified*, October 28, 1976;

Woe v. *Mathews*, 408 F.Supp. 419, 428 (E.D.N.Y. 1976), *remanded in part, dismissed in part sub nom. Woe* v. *Weinberger*, 556 F.2d 563 (2d Cir. 1977); *Suzuki* v. *Quisenberry*, 411 F.Supp. 1113, 1132-33 (D.Hawaii 1976); *Lynch* v. *Baxley*, 386 F.Supp. 378, 392 (M.D. Ala.1974); *Davis* v. *Watkins*, 384 F.Supp. 1196, 1206 (N.D.Ohio 1974); *Saville* v. *Treadway*, 404 F. Supp. 430, 437 (M.D.Tenn. 1974); *Welsch* v. *Likins*, 373 F.Supp. 487, 502 (D.Minn.1974), *aff'd in part and vacated and remanded in part*, 550 F.2d 1122 (8th Cir. 1977); *Morales* v. *Turman*, 383 F.Supp. 53, 124 (E.D. Tex.1974), *rev'd on other grounds*, 535 F.2d 864 (5th Cir. 1976), *judgment of Court of Appeals rev'd and remanded*, 430 U.S. 322, 97 S.Ct. 1189, 51 L.Ed.2d 368 (1977); *Wyatt* v. *Stickney*, 344 F.Supp. 387 (M.D.Ala. 1972), *aff'd in part, remanded in part and decision reserved in part sub nom. Wyatt* v. *Aderholt*, 503 F.2d 1305 (5th Cir. 1974); *Lessard* v. *Schmidt*, 349 F.Supp. 1078, 1096 (E.D.Wis.1972) (three-judge court), *vacated and remanded on other grounds*, 414 U.S. 473, 94 S.Ct. 713, 38 L.Ed.2d 661 (1974); *Dixon* v. *Attorney General of the Commonwealth of Pennsylvania*, 325 F.Supp. 966, 973-4 (M.D.Pa.1971) (consent decree), *but see Patton* v. *Dumpson*, 425 F.Supp. 621, 624 (S.D.N.Y.1977).[55]

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[55] The *Patton* court was troubled by the fact that in *Sanchez* v. *New Mexico*, 396 U.S. 276, 90 S.Ct. 588, 24 L.Ed.2d 469 (1970), the Supreme Court dismissed an appeal from a case which had rejected the least restrictive alternative for "want of a substantial federal question." For the precedential effect of a summary dismissal for want of a substantial federal question See *Mandel* v. *Bradley*, 432 U.S. 173, 97 S.Ct. 2238, 2240, 53 L.Ed.2d 199 (1977) ("Summary actions, however . . . should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved.") Moreover, the constitutional right to treatment and habilitation is a newly developed area of the law. Nearly all of the federal cases dealing with a constitutional right to treatment for mentally ill individuals and a constitutional right to habilitation for retarded individuals have

The right to minimally adequate habilitation in the least restrictive alternative stems from the Supreme Court's decision in *Shelton* v. *Tucker*, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960), in which the Court, addressing itself to the question of permissible abridgment of constitutional liberties, stated:

> even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.

All admissions to state facilities, be it through court commitment, or otherwise, entail an infringement on fundamental rights and freedoms. *See Eubanks* v. *Clarke*, 434 F.Supp. 1022, 1028, (E.D.Pa. 1977). Because of this, due process demands that if a state undertakes the habilitation of a retarded person, it must do so in the least restrictive setting consistent with that individual's habilitative needs. As we have heretofore pointed out, isolation and confinement are counter-productive in the habilitation of the retarded. Furthermore, since the law recognizes that habilitation other than in the least restrictive setting is a violation of one's constitutional rights, there is no question that Pennhurst, as an institution for the retarded, should be regarded as a monumental example of unconstitutionality with respect to the

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arisen since *Sanchez*. *See, e.g., O'Connor* v. *Donaldson*, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975); *Wyatt* v. *Aderhalt*, 503 F.2d 1305 (5th Cir. 1974); *Welsch* v. *Likins*, 373 F.Supp. 487 (D. Minn. 1974), *aff'd in part and vacated and remanded in part*, 550 F.2d 1122 (8th Cir. 1977). We feel that when the Court next examines the issue, it will find that there is such a constitutional right. *See Welsch*, 373 F.Supp. at 501-2; *Lynch*, 386 F.Supp. at 392. *See also, Developments in the Law—Civil Commitment of the Mentally Ill*, 87 Harv.L.Rev. 1190, 1247-8 (1974).

habilitation of the retarded.[56] The Commonwealth and its subdivisions have a constitutional duty to explore and provide the least stringent practicable alternatives to confinement of retarded individuals at Pennhurst. *Welsch* v. *Likins*, 373 F.Supp. 487, 502 (D.Minn.1974), *aff'd in part and vacated and remanded in part*, 550 F.2d 1122 (8th Cir. 1977). On the basis of this record, we find that the Commonwealth and its subdivisions did not fulfill and are not fulfilling this constitutional obligation with respect to the retarded at Pennhurst.

B. *Constitutional Right to be Free from Harm*

The retarded at Pennhurst have been physically abused. Lack of adequate supervision has produced an atmosphere of danger to the residents. Occasionally, there have been incidents of staff abuse of residents, including rape and beatings. Hundreds of injuries, both major and minor, are reported every month.

Residents of state institutions for the retarded have both an Eighth and Fourteenth Amendment right to freedom from harm. *Spence* v. *Staras*, 507 F.2d 554, 557 (7th Cir. 1974); *Romeo* v. *Youngberg*, No. 76-3429 at 3 (E.D.Pa., filed June 6, 1977); *Welsch* v. *Likins*, 373 F. Supp. 487, 502-3 (D.Minn.1974), *aff'd in part and vacated and remanded in part*, 550 F.2d 1122 (8th Cir. 1977); *New York State Association for Retarded Children, Inc.* v. *Rockefeller*, 357 F.Supp. 752, 764 (E.D.N.Y. 1973).

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[56] Moreover, habilitation in the least restrictive setting answers one of Chief Justice Burger's concerns, expressed in his concurrence in *Donaldson*, with respect to a constitutional right to treatment. His concern is that a state constitutionally might be able to justify indiscriminate confinement of individuals merely by providing treatment. *O'Connor* v. *Donaldson*, 422 U.S. 563, 589, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975). Since a state cannot constitutionally confine an individual in other than the least restrictive setting consistent with that individual's habilitative needs, it cannot confine a retarded person in a Pennhurst-like institution if that individual could benefit from habilitation in a less restrictive setting.

Defendants have argued that the recent Supreme Court decision, *Ingraham* v. *Wright*, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977), limits the applicability of the Eighth Amendment to those convicted of crimes. *Ingraham* held that the use of corporal punishment in public schools did not violate the student's Eighth Amendment rights. *Id.* 97 S.Ct. at 1409. In reaching this result, the Court reasoned:

> The schoolchild has little need for the protection of the Eighth Amendment. Though attendance may not always be voluntary, the public school remains an open institution. Except perhaps when very young, the child is not physically restrained from leaving school during school hours; and at the end of the school day, the child is invariably free to return home. Even while at school, the child brings with him the support of family and friends and is rarely apart from teachers and other pupils who may witness and protest any instances of mistreatment.
>
> The openness of the public school and its supervision by the community afford significant safeguards against the kind of abuses from which the Eighth Amendment protects the prisoner. In virtually every community where corporal punishment is permitted in the schools, these safeguards are reinforced by the legal constraints of the common law. Public schoolteachers and administrators are privileged at common law to inflict only such corporal punishment as is reasonably necessary for the proper education and discipline of the child; and punishment going beyond the privilege may result in both civil and criminal liability. . . . As long as the schools are open to public scrutiny, there is no reason to believe that the common law constrains will not effectively remedy and deter excess such as those alleged in this case.

Id. 97 S.C. at 1412 (footnote omitted). The retarded at Pennhurst have none of these safeguards. Due to their own handicaps, few of the retarded are in a position to aid or protect their fellow residents, or to complain about their own treatment. Pennhurst is isolated and segregated from the community. The residents are not free to leave at the end of the day. In addition, few, if any, of the physically abusive incidents at Pennhurst were committed as disciplinary measures. Furthermore, the *Ingraham* Court specifically reserved the question of the availability of the Eighth Amendment to individuals confined in "mental" institutions. *Id.* 97 S.Ct. at 1411 n. 37.

As stated by Judge Judd in *New York Association for Retarded Children, Inc.* v. *Rockefeller*, 357 F.Supp. 752, 764-5 (E.D.N.Y.1973):

> Since Willowbrook [an institution for the retarded] residents are for the most part confined behind locked gates, and are held without the possibility of a meaningful waiver of their right to freedom, they must be entitled to at least the same living conditions as prisoners . . . One of the basic rights of a person in confinement is protection from assaults by fellow inmates or by staff. . . . Another is the correction of conditions which violate "basic standards of human decency."

On the basis of the evidence in this record, we find that the constitutional right to be free from harm of the retarded residents at Pennhurst has been violated.

C. *Constitutional Right to Non-Discriminatory Habilitation*

In a three-judge decision emanating from this court, *Pennsylvania Association for Retarded Children* v. *Commonwealth of Pennsylvania*, 343 F.Supp. 279 (E.D.Pa. 1972), it was legally recognized for the first time that

the retarded had a constitutional right pursuant to the Equal Protection Clause of the Fourteenth Amendment to receive at least as much education and training as was being afforded by the Commonwealth to others.

As stated by Professor Burt in "Beyond the Right to Habilitation", in *The Mentally Retarded Citizen and the Law* 425-32 (1976):

> The *PARC* theory can and should mean that any state program that segregates mentally retarded citizens as such from others is highly suspect and that courts will require states to treat mentally retarded persons indistiguishably from others, except in ways that are both very limited and very clearly beneficial to the individual. By this test, segregation of the mentally retarded in a remote large-scale institution could never pass constitutional muster. . . .
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> [E]xisting large-scale geographically remote institutions cannot by their nature provide adequate programs to remedy the intellectual and emotional shortcomings and the galling social stigma that led the retarded residents to these institutions. If this evidence is fully marshaled in litigation, courts can . . . rule that present patterns of state segregation of retarded persons for "habilitation" or "educational" purposes are impermissible. Courts can . . . force states to close the Partlows and Willowbrooks and, even more important, to require alternative programs for mentally retarded persons which treat them as indistinguishably as possible from other persons. . . . A powerful case can thus be mounted that courts should command states to use extraordinary effort to avoid institutionalizing retarded citizens. By this analysis, *Wyatt* clearly was wrong in failing to address directly the adequacy of community alternatives to geographically remote residential institutional care. In this analysis, the ade-

> quacy of in-community resources is not an afterthought. It is central to the inquiry into whether separate treatment for the mentally retarded person is not inherently unequal just as racially segregated education was found inherently unequal in *Brown* v. *Board of Education.*

In this record, the evidence has been "fully marshaled" and we find that the confinement and isolation of the retarded in the institution called Pennhurst is segregation in a facility that clearly is separate and *not* equal. We are convinced that the same equal protection principles enunciated by the court in *Pennsylvania Association of Retarded Children* v. *Commonwealth of Pennsylvania,* 343 F.Supp. 279 (E.D.Pa.1972), prohibit the segregation of the retarded in an isolated institution such as Pennhurst where habilitation does not measure up to minimally adequate standards. As we have heretofore discussed in this opinion, the retarded at Pennhurst have been segregated in an institution in which they have been and are being denied minimally adequate habilitation. Thus, on the basis of this record we find that the retarded at Pennhurst have been and presently are being denied their Equal Protection Rights as guaranteed by the Fourteenth Amendment to the Constitution.

D. *Pennsylvania Statutory Right to Minimally Adequate Habilitation.*

The question has also been presented to the Court as to whether the residents at Pennhurst have a statutory right to minimally adequate habilitation. 50 P.S. § 4201 provides in pertinent part:

> The department [of public welfare] shall have power, and its duty shall be:
>
> (1) To assure within the State the availability and equitable provision of adequate mental health

> and mental retardation services for all persons who need them. . . .

This statute was first interpreted in *In Re: Joyce Z., a minor child*, No. 2035-69 (Common Pleas, Allegheny County, filed March 31, 1975). Joyce Z.'s caseworker petitioned the court, pursuant to 50 P.S. § 4406.[57] to commit Joyce to a state facility for care and treatment. The caseworkers suggested Western State School and Hospital as a proper facility for Joyce's commitment. A commitment hearing was held at which all the witnesses, including the superintendent of the institution itself, testified that Joyce would not receive adequate treatment at Western State School and Hospital. *Id.* at 9. In fact, the Commissioner of Mental Retardation for the Department of Welfare, Western Region, testified that if Joyce were placed in the institution, the regression which she was presently experiencing would continue because she would not be able to interact with staff due to staff shortages. *Id.* at 4. In its opinion the court, in construing 50 P.S. § 4201, stated:

> These are brave words. We mean to see that the State, acting through the Department of Public Welfare, abides by them.
>
> Joyce has a right to life given to her by the Constitution of the United States; *she has a right to treatment given to her by the Mental Health and Mental Retardation Act of Pennsylvania;* this court may order that course of treatment best suited to meet Joyce's needs.

Id. at 10-11. (Emphasis supplied).

It is abundantly clear that the Mental Health and Mental Retardation Act, 50 P.S. §§ 4201 *et seq.*, grants to the retarded in Pennsylvania the statutory right to min-

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[57] *See supra* note 12.

imally adequate habilitation. *See Eubanks* v. *Clarke*, 434 F.Supp. 1022, 1027 (E.D.Pa.1977); *In Re Joyce Z.*[58] Furthermore, it is equally clear that the Commonwealth and the counties have been charged under the Act with the responsibility of providing such minimally adequate habilitation to the retarded. The Act envisions

> a comprehensive cooperative State-county (or multi-county) program for the care, treatment and rehabilitation of persons who are . . . mentally retarded. . . . The State, through the Department of Welfare, is responsible for the overall supervision and control of the program to assure the availability of and equitable provision for adequate . . . mental retardation facilities, and the counties, separately or in concert, are assigned responsibilities as to particular programs. *Hoolick* v. *Retreat State Hospital*, 24 Pa.Cmwlth. 218, 221-22, 354 A.2d 609, 611 (1976). *See also*, 50 P.S. § 4201(8).[59]

On the basis of this record, we find that both the Commonwealth and the counties have violated their statutory obligation to provide minimally adequate habilitation to the retarded residents at Pennhurst. In particular, the Commonwealth has violated its statutory mandate to supervise and control the program of minimally adequate habilitation to these individuals.

E. *Federal Statutory Right to Non-Discriminatory Habilitation*

The question has also been presented whether Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794,

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[58] *Cf. Janet D.* v. *Carros*, 240 Pa.Super. 291, 362 A.2d 1060 (1976) (Juvenile Court Act, 11 P.S. §§ 50-101 *et seq.*, provides civilly committed juveniles a right to treatment).

[59] The counties also have the power to establish "[a]ny other service or program designed to prevent . . . the necessity of admitting or committing the mentally disabled to a facility." 50 P.S. § 4301(e)(3).

grants federal statutory rights to the retarded residents at Pennhurst which have been violated. Section 504 provides:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

There is no question that the retarded are "handicapped individuals" within the meaning of the Act, 42 Fed.Reg. 22678; *cf. Rhode Island Society for Autistic Children* v. *Board of Regents for Education for the State of Rhode Island*, No. 5081 at 8 (D.R.I., filed August 1, 1975), nor is there any question that Pennhurst is a "program or activity receiving Federal financial assistance."

In enacting Section 504 of the Rehabilitation Act of 1973, Congress has in effect codified the constitutional right to equal protection. Section 504 was originally introduced in 1971-72 as a bill to include the handicapped in the Civil Rights Act of 1964. Introducing the bill in the Senate on January 20, 1972, Senator Humphrey, its primary sponsor there, said:

> I introduce . . . a bill . . . to insure equal opportunities for the handicapped by prohibiting needless discrimination in programs receiving Federal financial assistance . . . . The time has come when we can no longer tolerate the invisibility of the handicapped in America . . . . I am calling for public attention to three-fourth of the Nation's institutionalized mentally retarded, who live in public and private residential facilities which are more than 50 years old, functionally inadequate, and designed simply to isolate these persons from society . . . . These people

> have the right to live, to work to the best of their ability—to know the dignity to which every human being is entitled. But too often we keep children, whom we regard as "different" or a "disturbing influence" out of our schools and community activities altogether . . . . Where is the cost-effectiveness in consigning them to . . . "terminal" care in an institution?
>
> These are people who can and must be helped to help themselves. That this is their constitutional right is clearly affirmed in a number of recent decisions in various judicial jurisdictions.

118 Cong. Rec. 525 (1972).

In view of our finding that the Equal Protection Clause of the Fourteenth Amendment prohibits the segregation of the retarded in an isolated institution such as Pennhurst where the habilitation provided the retarded does not meet minimally adequate standards, consistency requires that we find that the Pennhurst residents' federal statutory right to habilitation in a nondiscriminatory manner has been violated. *See Nattie T.* v. *Charles E. Holladay*, No. DC 75-31-S (N.D. Miss., filed July 20, 1977). We hold that Section 504 confers a private right of action; that it imposes affirmative obligations on state and local governmental officials and that under Section 504 unnecessarily separate and minimally inadequate services are discriminatory and unlawful. *Lloyd* v. *Regional Transportation Authority*, 548 F.2d 1277 (7th Cir. 1977); *Barnes* v. *Converse College*, 436 F.Supp. 635 (D.S.C., filed July 12, 1977); *Gurmankin* v. *Costanzo*, 411 F.Supp. 982 (E.D.Pa. 1976) *aff'd*, 556 F.2d 184 (3d Cir. 1977); 42 Fed.Reg. 22687 (1977); *cf. Lau* v. *Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974). On the basis of this record, we find that the rights of the retarded at Pennhurst under Section 504 of the Rehabilitation Act of 1973 have been and are being violated.

V. *Liability of the Individual Defendants*

Plaintiffs Terri Lee Halderman, Larry Taylor, Kenny Taylor, Robert Sobetsky, Theresa Sobetsky, Nancy Beth Bowman, George Sorotos, and Linda Taub [60] are retarded individuals who resided at Pennhurst. They seek monetary damages for injuries received while at the institution from the following defendants: Frank S. Beal (Secretary of the Psnnsylvania Department of Public Welfare); Stanley Meyers (Deputy Secretary for Mental Retardation, Pennsylvania Department of Public Welfare); Helen Wohlgemuth (former Secretary of the Pennsylvania Department of Public Welfare); Aldo Colautti (Executive Deputy Secretary, Pennsylvania Department of Public Welfare); Wilbur Hobbs (Deputy Secretary for Southeastern Region, Pennsylvania Department of Public Welfare); Russell Rice, Jr. (Commissioner of Mental Retardation for Southeastern Region, Pennsylvania Department of Public Welfare); C. Duane Youngberg (Superintendent of Pennhurst); Robert Smilovitz (former Assistant Superintendent of Pennsylvania); Joseph Foster (Assistant Superintendent of Pennhurst); Margaret Green (employee at Pennhurst); Betty Uphold (a supervisor on Unit 9 at Pennhurst); Alice Barton (a supervisor on Unit 7 at Pennhurst); P. E. (Pauline) Klick (charge aid on Unit 7 at Pennhurst); Dr. Parocca (a former Pennhurst physician) and Helen Francis (Director of Nursing at Pennhurst).

As the Court heretofore found, these plaintiffs did suffer serious injury during their residence at Pennhurst. However, there was no evidence introduced at trial that any one of the above named defendants was, in any way, personally involved with the physical abuses inflicted upon these residents. To the contrary, the evidence

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[60] Mr. Taub testified that neither he nor his daughter, Linda, seek monetary damages despite the allegation in the complaint to the contrary.

shows that the defendants acted in the utmost good faith and that they did not know nor reasonably should have known that the actions which they took, or failed to take, within the sphere of their official responsibilities were in any way violative of the rights of the retarded residents at Pennhurst. For the most part, the evidence showed that those affiliated with the administration of Pennhurst were dedicated and sincere in their efforts to habilitate the retarded who came within the sphere of their supervision. They apparently took every means available to them to reduce the incidents of abuse and injury, but were constantly faced with staff shortages. In addition, as we have already found, the administration at Pennhurst was saddled with an institution which by its very nature produced an atmosphere conducive to injury. The Court, therefore, finds that the defendants have met their burden of convincing us by a preponderance of the evidence that they are entitled to the good faith immunity from damages afforded to such officials in conection with the injuries suffered by the named plaintiffs. *O'Connor* v. *Donaldson*, 422 U.S. 563, 576-77, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975); *Wood* v. *Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975); *Thompson* v. *Burke*, 556 F.2d 231, 239-40 (3d Cir. 1977); *Skehan* v. *Board of Trustees of Bloomsburg State College*, 538 F.2d 53, 59-62 (3d Cir. 1976). We find that the individual defendants are dedicated professionals in the field of retardation who were given very little with which to accomplish the habilitation of the retarded at Pennhurst.

Accordingly, we find that there is no basis for awarding monetary damages in this case.

VI. *Conclusion*

This opinion is in lieu of Findings of Fact and Conclusions of Law, pursuant to Rule 52(a) of the Federal Rules of Civil Procedure. As we have attempted to make clear, our Findings and Conclusions pertain solely to the retarded at Pennhurst.

For the reasons heretofore enunciated, the Court finds that the retarded at Pennhurst have been and are presently being denied certain constitutional and statutory rights in connection with their institutionalization at Pennhurst.

In an Order filed this date, we have scheduled a hearing for Friday, January 6, 1978 at 9:00 a.m. in Courtroom 10-B of this United States Courthouse, 601 Market Street, Philadelphia, Pennsylvania for the purpose of determining the appropriate relief to be granted.

ON INJUNCTIVE RELIEF

In an opinion filed on December 23, 1977, this Court made findings of fact and conclusions of law in this matter. Upon its findings, the Court held that the constitutional and statutory rights of the retarded at Pennhurst State School and Hospital ("Pennhurst") had been and are being violated. Some of the determinations made by the Court in its opinion were:

1. That when a state institutionalizes individuals because they are retarded, the United States Constitution (Eighth and Fourteenth Amendments) and the laws of Pennsylvania (50 P.S. § 4101 *et seq.*) require the state to provide such minimally adequate habilitation as will afford a reasonable opportunity for them to acquire and maintain such life skills as are necessary to enable them to cope as effectively as their capacities permit.

2. That the Rehabilitation Act of 1973, 29 U.S.C. § 794, grants rights to the retarded residents of Pennhurst, which rights have been and are being violated.

3. That the retarded at Pennhurst are not receiving minimally adequate habilitation and that such minimally adequate habilitation cannot be provided at Pennhurst because it does not provide an atmosphere conducive

to normalization, which the experts all agree is vital to the minimally adequate habilitation of the retarded.

Having concluded the liability phase of this litigation, we must now determine the appropriate relief. In view of the Court's finding that institutionalization at Pennhurst is not conducive to normalization, which is vital to the habilitation of the retarded, our Order must provide that immediate steps be taken to remove the retarded residents from Pennhurst. Great caution and care must be exercised, however, to make certain that each and every retarded resident who is moved from Pennhurst can be accommodated in a community facility which will provide minimally adequate habilitation. Furthermore, the Court's Order shall not be construed to limit in any manner the use of the Pennhurst facilities from any other purpose in the future.

A hearing was held on January 6, 1978, at which the Court requested that the parties meet and attempt to agree upon a Court order which would be acceptable to all the litigants. After meeting, the parties informed the Court that they had been unable to agree and would never be able to agree. The Court then directed that the parties submit proposed Orders detailing their views as to the appropriate relief for the Court to grant together with a memorandum pointing out what they considered unacceptable in their opponent's proposed Order.

The Order submitted by the Commonwealth defendants contained a plan which was essentially the same plan introduced by them at the trial in May, 1977. As was pointed out in this Court's opinion, the Commonwealth defendants agreed that the retarded should be removed from Pennhurst and readily admitted that the only reason that the litigation was necessary was because they wished to accomplish the closing of Pennhurst as a residence for the retarded, pursuant to their own schedule which was vague and indefinite.

A final hearing was held on January 16, 1978, at which time the parties informed the Court that they did not intend to introduce any additional evidence. All the parties agreed that the record in this case contained all the evidence necessary for the Court to formulate its Order.

Accordingly, we shall this date enter an Order of judgment in favor of the plaintiffs and against the defendants, and shall mandate the appropriate injunctive relief necessary to remedy the constitutional and statutory violations which the Court in its Opinion of December 23, 1977 found are being suffered by the retarded residents at Pennhurst.

ORDER

AND NOW, this 17th day of March, 1978, pursuant to findings of fact and conclusions of law made by the Court in an Opinion filed December 23, 1977, it is hereby ORDERED that judgment is entered in favor of the plaintiffs and against the defendants, and injunctive relief is ORDERED as follows:

1. Commonwealth and county defendants, their successors, and their officers, agents, servants, employees, attorneys and all persons in active concert or participation with them are permanently enjoined to provide suitable community living arrangements for the retarded residents of Pennhurst, and those retarded persons on its waiting list, together with such community services as are necessary to provide them with minimally adequate habilitation until such time as the retarded individual is no longer in need of such living arrangement and/or community service.

2. Commonwealth and county defendants, as aforesaid, are permanently enjoined to develop and to provide a written individualized program plan, formulated in ac-

cordance with professional standards (Opinion, page 25; Roos N.T. 1-115, 1-116, Hare N.T. 8-168) to each member of plaintiff class, to provide to each an individualized habilitation program, to provide annual periodic review thereof and the opportunity to each member of plaintiff class and to his or her next friend to be heard thereon.

3. Commonwealth and county defendants, as aforesaid, are permanently enjoined to provide all necessary and proper monitoring mechanisms to assure that community living arrangements and other community services of the necessary quantity and quality are provided and maintained.

4. Commonwealth and county defendants, as aforesaid, are permanently enjoined to implement with dispatch Act 256 of the 1970 Pennsylvania General Assembly, the specific schedule to be set by further Order of this Court upon recommendation of the Master as set forth in paragraph 6(a) below.

5. The Court, on the basis of nine weeks' testimony in this case and the submissions of all parties, finds that the implementation of this Order will be impossible without the appointment of a Special Master, and, therefore, pursuant to Rule 53, Fed.R.Civ.P., and in the exercise of the Court's equitable powers, the Court shall appoint a Special Master with the power and duty to plan, organize, direct, supervise and monitor the implementation of this and any further Orders of the Court. Commonwealth and county defendants, their successors, officers, agents, servants, employees, attorneys and all persons in active concert or participation with them shall provide the Master with access to all premises, records, documents and personnel and residents and with every other cooperation and service necessary to the discharge of the Master's duties and shall make available to the Master all professional and other resources of the Department of Public Welfare, the Pennhurst State School and Hos-

pital, the County Offices of Mental Retardation and the Base Service Units as may be necessary to execute this Court's Orders.

6. The Special Master shall prepare and present to this Court for its approval and Order a Plan of Implementation which shall include the following:

(a) A plan specifying the quantity and type of community living arrangements and other community services necessary for the habilitation of all plaintiffs in the least separate, most integrated, least restrictive community setting, taking into account the existing community services in the five county area and including, by county, specification of the residential, program and staffing patterns necessary, the delineation of responsibility for their creation and maintenance, their funding and a specified time frame for their provision.

(b) A report specifying resources, procedures, and a schedule for individual evaluations and the formulation of individual exit and community program plans required for the habilitation of each member of plaintiff class and for their periodic review.

(c) A plan for the recruitment, hiring and training of a sufficient number of qualified community staff to be detailed to each Base Service Unit to manage the preparation of individual exit and community program plans for each member of plaintiff class and upon completion of such plans to assist in the execution of the responsibility to create, develop, maintain, and monitor the community living arrangements and other services required.

(d) A plan for the creation, development and maintenance of mechanisms to monitor a system of community services to assure that community living arrangements and other community services of the

necessary quality and quantity are continuously provided to retarded persons in the least separate, most integrated, least restrictive community setting, which plan shall include but shall not be limited to the provision of friend-advocates to assist in the protection of the rights of each member of plaintiff class.

(e) A plan to provide retarded people, members of the class, with continuing information concerning the effect and the implementation of the Court's decision, concerning the plans to provide all necessary community living arrangements and other community services to them and any other general or specific information regarding the conditions necessary to habilitation of retarded persons and to provide for consultation with them.

(f) A plan to provide parents and family of the members of the class with continuing information concerning the effect and the implementation of the Court's decision, concerning the plans to provide all necessary community living arrangements and other community services to their relative and any other general or specific information regarding the conditions necessary to habilitation of retarded persons and to provide for consultation with them.

(g) A plan to provide opportunities for alternative employment to each employee of Pennhurst State School and Hospital, including employment in community programs and otherwise.

7. Within not more than sixty (60) days after appointment, the Master shall file with this Court the reports required at paragraphs 6(a) and (b) above and 11 below. A hearing will then be scheduled by the Court within fifteen (15) days from the date of their filing. Following the adoption of any plan by Order of the Court, it shall be implemented forthwith.

8. The Master shall engage such staff of his or her own as he or she finds necessary, subject to the approval of the Court. The Master and his or her staff shall be compensated by commonwealth defendants at a rate to be set by the Court; the expenses of the mastership shall be borne by the commonwealth defendants. The Master shall promptly submit to the Court a form of Order with respect to these matters.

9. County defendants, as aforesaid, are hereby enjoined from recommending or in any way counselling that any individual be committed to Pennhurst, and from petitioning for the commitment of any individual to Pennhurst, and from advancing in any way any application for admission to Pennhurst, and are herewith enjoined from participating in any program or activity in connection with the placement in the future or commitment in the future of any retarded person at Pennhurst.

10. Commonwealth defendants, as aforesaid, are hereby enjoined from recommending or in any way counselling that any individual be committed to Pennhurst, and from petitioning for the commitment of any individual to Pennhurst, and from advancing in any way any application for admission to Pennhurst, and are herewith enjoined from participating in any program or activity in connection with the placement in the future or commitment in the future of any retarded person at Pennhurst. Commonwealth defendants are further enjoined from providing a residence and/or habilitation at Pennhurst to any retarded person who is not as of this date a resident at Pennhurst.

11. The Special Master, as aforesaid, shall prepare and present to the Court for its Order a plan for the interim operation of Pennhurst pending its prompt replacement by community living arrangements and other community services. The plan shall address, but need not be limited to, the matters referenced in paragraphs

12-19 below, any other condition at Pennhurst which threatens the life, safety or well-being of any Pennhurst resident, and measures to assure that the interim operation of Pennhurst, including all activities therein, contributes to the prompt provision of services in the community necessary to the habilitation of each Pennhurst resident.

12. Commonwealth defendants are hereby mandated to take every precaution to prevent the physical or psychological abuse, neglect or mistreatment of any Pennhurst resident. Each and every alleged incident of abuse, neglect or mistreatment shall be promptly investigated. The manner and mechanisms of such investigations shall be developed and established by the plan referenced in paragraph 11.

13. Commonwealth defendants are hereby enjoined to exert the maximum effort in enforcing the following Department of Public Welfare regulations on the "Use of Restraints in Treating Patients/Residents" and "Personnel Rules and Institutional Policy on Acts of Abuse Against Patients/Residents" (promulgated in 7 Pennsylvania Bulletin 3199 (October 29, 1977)) which include *inter alia* the following requirements:

> a. That mechanical restraints controlling involuntary movement or lack of muscular control due to organic conditions be employed only as part of an individual program plan, upon a finding of the program team trained in the use of such restraints, and only when necessary to 1) prevent injury to self or others, or 2) promote normative body positioning and physical functioning.
>
> b. That restraints shall be used to control acute or episodic, aggressive behavior only when a resident is acting in such a manner as to be a clear and present danger to self or others and only when less restric-

tive measures and techniques have been proven to be less effective.

c. That mechanical restraints may be used only upon the order of a qualified mental retardation professional for a period not to exceed two hours; that the resident must be checked every fifteen minutes and must be examined by a physician before the initial order is renewed.

d. That chemical restraints may be administered only upon the order of a physician.

e. That seclusion (practice of placing a resident alone in a locked room) is prohibited in all cases except where it is apparent that there exists a clear and present danger to the resident, other residents or staff and all other less restrictive methods have failed or have been deemed inappropriate. (Title XIX—ICF-MR 249.13 and State Agency Letter No. 77-30 issued December 14, 1977.)

f. That individual program plans shall require and document that all possible attempts be made at preventing assaultive behavior by positive, constructive intervention.

g. That acts of abuse by employees directed at residents are absolutely prohibited and are cause for disciplinary action including dismissal.

h. That an abusive act is any action which may cause or causes physical or emotional harm or injury and includes any willful action which violates the regulations on use of restraints.

14. Commonwealth defendants are hereby enjoined from:

(a) Administering excessive or unnecessary medications to class members;

(b) Using medication as punishment, for the convenience of the staff, as a substitute for programming, or in quantities that interfere with a Pennhurst resident's functioning;

(c) Failing to ensure that only appropriately trained staff are allowed to administer drugs to residents;

(d) Failing to provide training programs to staff who administer drugs to residents. The nature of such training programs, and the qualifications to be required of staff members who administer drugs to residents shall be established in the plan;

(e) Administering drugs to residents on a p.r.n. basis. Written policies and procedures governing the safe administration and handling of medications shall be established pursuant to guidelines developed in the plan;

(f) Failing to monitor and to provide for at least monthly reviews by a physician of each resident's medications.

15. Commonwealth defendants are enjoined from failing to provide a program of medical and health related services for residents which provides accessibility, quality and continuity of care for physical illness or injury. The plan of implementation shall develop and establish detailed standards for the provision of adequate medical and health related services to residents.

16. Commonwealth defendants are hereby enjoined from failing to provide individualized adaptive wheelchairs to each physically handicapped resident who needs them. Each and every individual resident shall be immediately evaluated to ascertain the need for such equipment.

17. Commonwealth defendants are hereby enjoined from feeding any resident in the supine position or in any position less than the maximum upright position consistent with their capabilities and handicaps.

18. Commonwealth defendants are hereby enjoined from denying any resident programmed activities as punishment.

19. Commonwealth defendants are enjoined to take every precaution to keep every Pennhurst building currently housing residents clean, odorless and insect-free at all times.

20. All bulletins, memoranda, directives of official policy issued by the defendants in connection with the implementation of this Court's Order, shall, upon issuance, be sent to counsel for each of the plaintiffs.

21. Jurisdiction is retained by this Court until further Order.

APPENDIX D

CHAPTER 75—DEVELOPMENTALLY DISABLED ASSISTANCE AND BILL OF RIGHTS

SUBCHAPTER I—GENERAL PROVISIONS

§ 6000. Congressional declaration of findings and purpose

(a) The Congress finds that—

(1) there are more than two million persons with developmental disabilities in the United States;

(2) individuals with disabilities occurring during their developmental period are more vulnerable and less able to reach an independent level of existence than other handicapped individuals who generally have had a normal developmental period on which to draw during the rehabilitation process;

(3) persons with developmental disabilities often require specialized lifelong services to be provided by many agencies in a coordinated manner in order to meet the persons' needs;

(4) general service agencies and agencies providing specialized services to disabled persons tend to overlook or exclude persons with developmental disabilities in their planning and delivery of services; and

(5) it is in the national interest to strengthen specific programs, especially programs that reduce or eliminate the need for institutional care, to meet the needs of persons with developmental disabilities.

(b) (1) It is the overall purpose of this chapter to assist States to assure that persons with developmental disabilities receive the care, treatment, and other services necessary to enable them to achieve their maximum potential through a system which coordinates, monitors, plans, and evaluates those services and which ensures the protection of the legal and human rights of persons with developmental disabilities.

(2) The specific purposes of this chapter are—

(A) to assist in the provision of comprehensive services to persons with developmental disabilities, with priority to those persons whose needs cannot be covered or otherwise met under the Education for All Handicapped Children Act, the Rehabilitation Act of 1973, or other health, education, or welfare programs;

(B) to assist States in appropriate planning activities;

(C) to make grants to States and public and private, nonprofit agencies to establish model programs, to demonstrate innovative habilitation techniques, and to train professional and paraprofessional personnel with respect to providing services to persons with developmental disabilities;

(D) to make grants to university affiliated facilities to assist them in administering and operating demonstration facilities for the provision of services to persons with developmental disabilities, and interdisciplinary training programs for personnel needed to provide specialized services for these persons; and

(E) to make grants to support a system in each State to protect the legal and human rights of all persons with developmental disabilities.

Pub.L. 88-164, Title I, § 101, as added Pub.L. 95-602, Title V, § 502, Nov. 6, 1978, 92 Stat. 3004.

§ 6001. Definitions

For purposes of this chapter:

(1) The term "State" includes Puerto Rico, Guam, the Northern Mariana Islands, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the District of Columbia.

(2) The term "facility for persons with developmental disabilities" means a facility, or a specified portion of a facility, designed primarily for the delivery of one or more services to persons with one or more developmental disabilities.

(3) The terms "nonprofit facility for persons with developmental disabilities" and "nonprofit private institution of higher learning" mean, respectively, a facility for persons with developmental disabilities and an institution of higher learning which are owned and operated by one or more nonprofit corporations or associations no part of the net earnings of which insures, or may lawfully inure, to the benefit of any private shareholder or individual; and the term "nonprofit private agency or organization" means an agency or organization which is such a corporation or association or which is owned and operated by one or more of such corporations or associations.

(4) The term "construction" includes construction of new buildings, acquisition, expansion, remodeling, and

alteration of existing buildings, and initial equipment of any such buildings (including medical transportation facilities); including architect's fees, but excluding the cost of offsite improvements and the cost of the acquisition of land.

(5) The term "cost of construction" means the amount found by the Secretary to be necessary for the construction of a project.

(6) The term "title", when used with reference to a site for a project, means a fee simple, or such other estate or interest (including a leasehold on which the rental does not exceed 4 per centum of the value of the land) as the Secretary finds sufficient to assure for a period of not less than fifty years undisturbed use and possession for the purposes of construction and operation of the project.

(7) The term "developmental disability" means a severe, chronic disability of a person which—

(A) is attributable to a mental or physical impairment or combination of mental and physical impairments;

(B) is manifested before the person attains age twenty-two;

(C) is likely to continue indefinitely;

(D) results in substantial functional limitations in three or more of the following areas of major life activity: (i) self-care, (ii) receptive and expressive language, (iii) learning, (iv) mobility, (v) self-direction, (vi) capacity for independent living, and (vii) economic self-sufficiency; and

(E) reflects the person's need for a combination and sequence of special, interdisciplinary, or generic

care, treatment, or other services which are of lifelong or extended duration and are individually planned and coordinated.

(8) (A) The term "services for persons with developmental disabilities" means priority services (as defined in subparagraph (B)), and any other specialized services or special adaptations of generic services for persons with developmental disabilities, including in these services the diagnosis, evaluation, treatment, personal care, day care, domiciliary care, special living arrangements, training, education, sheltered employment, recreation, counseling of the individual with such disability and of his family, protective and other social and socio-legal services, information and referral services, follow-along services, and transportation services necessary to assure delivery of services to persons with developmental disabilities.

(B) The term "priority services" means case management services (as defined in subparagraph (C)), child development services (as defined in subparagraph (D)), alternative community living arrangement services (as defined in subparagraph (E)), and nonvocational social-developmental services (as defined in subparagraph (F)).

(C) The term "case management services" means such services to persons with developmental disabilities as will assist them in gaining access to needed social, medical, educational, and other services; and such term includes—

(i) follow-along services which ensure, through a continuing relationship, lifelong if necessary, between an agency or provider and a person with a developmental disability and the person's immediate relatives or guardians, that the changing needs of the person and the family are recognized and appropriately met; and

(ii) coordination services which provide to persons with developmental disabilities support, access to (and coordination of) other services, information on programs and services, and monitoring of the persons' progress.

(D) The term "child development services" means such services as will assist in the prevention, identification, and alleviation of developmental disabilities in children, and includes (i) early intervention services, (ii) counseling and training of parents, (iii) early identification of developmental disabilities, and (iv) diagnosis and evaluation of such developmental disabilities.

(E) The term "alternative community living arrangement services" means such services as will assist persons with developmental disabilities in maintaining suitable residential arrangements in the community, and includes in-house services (such as personal aides and attendants and other domestic assistance and supportive services), family support services, foster care services, group living services, respite care, and staff training, placement, and maintenance services.

(F) The term "nonvocational social-developmental services" means such services as will assist persons with developmental disabilities in performing daily living and work activities.

(9) The term "satellite center" means an entity which is affiliated with one or more university affiliated facilities and which functions as a community or regional extension of such university affiliated facility or facilities in the delivery of services to persons with developmental disabilities, and their families, who reside in geographical areas where adequate services are not otherwise available.

(10) The term "university affiliated facility" means a public or nonprofit facility which is associated with, or is an integral part of, a college or university and which provides for at least the following activities:

(A) Interdisciplinary training for personnel concerned with developmental disabilities.

(B) Demonstration of the provision of exemplary services relating to persons with developmental disabilities.

(C) (i) Dissemination of findings relating to the provision of services to persons with developmental disabilities, and (ii) providing researchers and government agencies sponsoring service-related research with information on the needs for further service-related research.

(11) The term "Secretary" means the Secretary of Health, Education, and Welfare.

(12) The term "State Planning Council" means a State Planning Council established under section 6067 of this title.

As amended Pub.L. 95-602, Title V, § 503(a), (b)(1), (c)-(f), Nov. 6, 1978, 92 Stat. 3004-3006.

§ 6002. Federal share

Percentage limitation

(a) The Federal share of any project to be provided through grants under subchapter II of this chapter and allotments under subchapter III of this chapter may not exceed 75 per centum of the necessary cost thereof as determined by the Secretary, except that if the project is located in an urban or rural poverty area, the Federal share may not exceed 90 per centum of the project's necessary costs as so determined.

Non-Federal share; medium of payment

(b) The non-Federal share of the cost of any project assisted by a grant or allotment under this chapter may be provided in kind.

State expenditures

(c) For the purpose of determining the Federal share with respect to any project, expenditures on that project by a political subdivision of a State or by a nonprofit private entity shall, subject to such limitations and conditions the Secretary may by regulation prescribe, be deemed to be expenditures by such State in the case of a project under subchapter III of this chapter or by a university-affiliated facility or a satellite center, as the case may be, in the case of a project assisted under subchapter II of this chapter.

Pub.L. 88-164, Title I, § 103, as added Pub.L. 94-103, Title I, § 125, Oct. 4, 1975, 89 Stat. 498.

§ 6003. State control of operations

Except as otherwise specifically provided, nothing in this chapter shall be construed as conferring on any Federal officer or employee the right to exercise any supervision or control over the administration, personnel, maintenance, or operation of any facility for persons with developmental disabilities with respect to which any funds have been or may be expended under this chapter.

Pub.L. 88-164, Title I, § 104, as added Pub.L. 94-103, Title I, § 125, Oct. 4, 1975, 89 Stat. 498.

§ 6004. Records and audit

(a) Each recipient of assistance under this chapter shall keep such records as the Secretary shall prescribe, including (1) records which fully disclose (A) the amount and disposition by such recipient of the proceeds of such assistance, (B) the total cost of the project or undertaking in connection with which such assistance is given or used, and (C) the amount of that portion of the cost of the project or undertaking supplied by other sources, and (2) such other records as will facilitate an effective audit.

(b) The Secretary and the Comptroller General of the United States, or any of their duly authorized representatives, shall have access for the purpose of audit and examination to any books, documents, papers, and records of the recipients of assistance under this chapter that are pertinent to such assistance.

Pub.L. 88-164, Title I, § 105, as added Pub.L. 94-103, Title I, § 125, Oct. 4, 1975, 89 Stat. 498.

§ 6005. Employment of handicapped individuals

As a condition of providing assistance under this chapter, the Secretary shall require that each recipient of such assistance take affirmative action to employ and advance in employment qualified handicapped individuals on the same terms and conditions required with respect to the employment of such individuals by the provisions of the Rehabilitation Act of 1973 which govern employment (1) by State rehabilitation agencies and rehabilitation facilities, and (2) under Federal contracts and subcontracts.

Pub.L. 88-164, Title I, § 106, as added Pub.L. 94-103, Title I, § 125, Oct. 4, 1975, 89 Stat. 498.

§ 6006. Recovery of expenditures under certain conditions; lien

If any facility with respect to which funds have been paid under subchapter II or III of this chapter shall, at any time within twenty years after the completion of construction—

(1) be sold or transferred to any person, agency, or organization which is not a public or nonprofit private entity, or

(2) cease to be a public or other nonprofit facility for persons with development disabilities,

the United States shall be entitled to recover from either the transferor or the transferee (or, in the case of a facility which has ceased to be a public or other nonprofit facility for persons with developmental disabilities, from the owners thereof) an amount bearing the same ratio to the then value (as determined by the agreement of the parties or by action brought in the district court of the United States for the district in which the facility is situated) of so much of such facility as constituted an approved project or projects, as the amount of the Federal participation bore to the cost of the construction of such project or projects. Such right of recovery shall not constitute a lien upon such facility prior to judgment. The Secretary, in accordance with regulations prescribed by him, may, upon finding good cause therefor, release the applicant or other owner from the obligation to continue such facility as a public or other nonprofit facility for persons with developmental disabilities.

Pub.L. 88-164, Title I, § 107, as added Pub.L. 94-103, Title I, § 125, Oct. 4, 1975, 89 Stat. 499.

[§ 6007. Repealed. Pub.L. 95-602, Title V, § 504(a), Nov. 6, 1978, 92 Stat. 3006]

§ 6008. Promulgation of regulations

The Secretary, not later than 180 days after the date of enactment of any Act amending the provisions of this chapter, shall promulgate such regulations as may be required for the implementation of such amendments.

As amended Pub.L. 95-602, Title V, § 505, Nov. 6, 1978, 92 Stat. 3007.

§ 6009. Evaluation system

Development

(a) The Secretary shall develop, not later than October 1, 1979, a comprehensive system for the evaluation

of services provided to persons with developmental disabilities through programs (including residential and non-residential programs) assisted under this chapter. The Secretary shall require, as a condition to a State's receipt of assistance on and after October 1, 1980, under this chapter, that the State submit to the Secretary, in such form and manner as he shall prescribe, a time-phased plan for the implementation of such a system. The Secretary shall require, as a condition to a State's receipt of assistance on and after October 1, 1982, under this chapter, that the State provide assurances satisfactory to the Secretary that the State is using such a system.

Statement of purpose

(b) The evaluation system to be developed under subsection (a) of this section shall—

(1) provide objective measures of the developmental progress of persons with developmental disabilities using data obtained from individualized habilitation plans as required under section 6011 of this title or other comparable individual data;

(2) provide a method of evaluating programs providing services for persons with developmental disabilities which method uses the measures referred to in paragraph (1); and

(3) provide effective measures to protect the confidentiality of records of, and information describing, persons with developmental disabilities.

Report to Congress

(c) Upon development of the evaluation system described in subsection (b) of this section, the Secretary shall submit to Congress a report on the system, which report shall include an estimate of the costs to the Federal Government and the States of developing and implementing such a system.

(d) Repealed. Pub.L. 95-602, Title V, § 506(c), Nov. 6, 1978, 92 Stat. 3007.

As amended Pub.L. 95-602, Title V, §§ 504(b)(1), 506, Nov. 6, 1978, 92 Stat. 3006, 3007.

§ 6010. Congressional findings respecting rights of developmentally disabled

Congress makes the following findings respecting the rights of persons with developmental disabilities:

(1) Persons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities.

(2) The treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize the development potential of the person and should be provided in the setting that is least restrictive of the person's personal liberty.

(3) The Federal Government and the States both have an obligation to assure that public funds are not provided to any institutional or other residential program for persons with developmental disabilities that—

(A) does not provide treatment, services, and habilitation which is appropriate to the needs of such persons; or

(B) does not meet the following minimum standards:

(i) Provision of a nourishing, well-balanced daily diet to the persons with developmental disabilities being served by the program.

(ii) Provision to such persons of appropriate and sufficient medical and dental services.

(iii) Prohibition of the use of physical restraint on such persons unless absolutely necessary and prohibition of the use of such restraint as a punishment or as a substitute for a habilitation program.

(iv) Prohibition on the excessive use of chemical restraints on such persons and the use of such restraints as punishment or as a substitute for a habilitation program or in quantities that interfere with services, treatment, or habilitation for such persons.

(v) Permission for close relatives of such persons to visit them at reasonable hours without prior notice.

(vi) Compliance with adequate fire and safety standards as may be promulgated by the Secretary.

(4) All programs for persons with developmental disabilities should meet standards which are designed to assure the most favorable possible outcome for those served, and—

(A) in the case of residential programs serving persons in need of comprehensive health-related, habilitative, or rehabilitative services, which are at least equivalent to those standards applicable to intermediate care facilities for the mentally retarded promulgated in regulations of the Secretary on January 17, 1974 (39 Fed. Reg. pt. II), as appropriate when taking into account the size of the institutions and the service delivery arrangements of the facilities of the programs;

(B) in the case of other residential programs for persons with developmental disabilities,

which assure that care is appropriate to the needs of the persons being served by such programs, assure that the persons admitted to facilities of such programs are persons whose needs can be met through services provided by such facilities, and assure that the facilities under such programs provide for the humane care of the residents of the facilities, are sanitary, and protect their rights; and

(C) in the case of nonresidential programs, which assure the care provided by such programs is appropriate to the persons served by the programs.

The rights of persons with developmental disabilities described in findings made in this section are in addition to any constitutional or other rights otherwise afforded to all persons.

As amended Pub.L. 95-602, Title V, § 507, Nov. 6, 1978, 92 Stat. 3007.

§ 6011. Habilitation plans

Conditic for receipt of state allotment

(a) The Secretary shall require as a condition to a State's receiving an allotment under subchapter III of this chapter that the State provide the Secretary satisfactory assurances that each program (including programs of any agency, facility, or project) which receives funds from the State's allotment under such part (1) has in effect for each developmentally disabled person who receives services from or under the program a habilitation plan meeting the requirements of subsection (b) of this section, and (2) provides for an annual review, in accordance with subsection (c) of this section, of each such plan.

Requirements

(b) A habilitation plan for a person with developmental disabilities shall meet the following requirements:

(1) The plan shall be in writing.

(2) The plan shall be developed jointly by (A) a representative or representatives of the program primarily responsible for delivering or coordinating the delivery of services to the person for whom the plan is established, (B) such person, and (c)[1] where appropriate, such person's parents or guardian or other representative.

(3) The plan shall contain a statement of the long-term habilitation goals for the person and the intermediate habilitation objectives relating to the attainments of such goals. Such objectives shall be stated specifically and in sequence and shall be expressed in behavioral or other terms that provide measurable indices of progress. The plan shall (A) describe how the objectives will be achieved and the barriers that might interfere with the achievement of them, (B) state objective criteria and an evaluation procedure and schedule for determining whether such objectives and goals are being achieved, and (C) provide for a program coordinator who will be responsible for the implementation of the plan.

(4) The plan shall contain a statement (in readily understandable form) of specific habilitation services to be provided, shall identify each agency which will deliver such services, shall describe the personnel (and their qualifications) necessary for the provision of such services, and shall specify the date of the initiation of each service to be provided and the anticipated duration of each such service.

(5) The plan shall specify the role and objectives of all parties to the implementation of the plan.

Annual review

(c) Each habilitation plan shall be reviewed at least annually by the agency primarily responsible for the delivery of services to the person for whom the plan was established or responsible for the coordination of the delivery of services to such person. In the course of the review, such person and the person's parents or guardian or other representative shall be given an opportunity to review such plan and to participate in its revision.

As amended Pub.L. 95-602, Title V, § 514(a), Nov. 6, 1978, 92 Stat. 3016.

§ 6012. Protection and advocacy of individual rights; reports; State allotments and reallotments; ratio; authorization of appropriations

(a) In order for a State to receive an allotment under subchapter III of this chapter, (1) the State must have in effect a system to protect and advocate the rights of persons with developmental disabilities, (2) such system must (A) have the authority to pursue legal, administrative, and other appropriate remedies to insure the protection of the rights of such persons who are receiving treatment, services, or habilitation within the State, (B) not be administered by the State Planning Council, and (C) be independent of any agency which provides treatment, services, or habilitation to persons with developmental disabilities, and (3) the State must submit to the Secretary in a form prescribed by the Secretary in regulations (A) a report, not less often than once every three years, describing the system, and (B) an annual report describing the activities carried out under the system and any changes made in the system during the previous year.

(b) (1) (A) To assist States in meeting the requirements of subsection (a) of this section, the Secretary shall allot to the States the sums appropriated under paragraph (2). Allotments and reallotments of such sums shall be made on the same basis as the allotments and reallotments are made under the first sentence of subsections (a) (1) and (d) of section 6062 of this title, except that no State (other than Guam, the Northern Mariana Islands, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands) in any fiscal year shall be allotted an amount under this subparagraph which is less than the greater of $50,000 or the amount of the allotment to the State under this paragraph for the previous fiscal year.

(B) Notwithstanding subparagraph (A), if the aggregate of the amounts of the allotments for grants to be made in accordance with such subparagraph for any fiscal year exceeds the total of the amounts appropriated for such allotments under paragraph (2), the amount of a State's allotment for such fiscal year shall bear the same ratio to the amount otherwise determined under such subparagraph as the total of the amounts appropriated for that year under paragraph (2) bears to the aggregate amount required to make an allotment to each of the States in accordance with subparagraph (A).

(2) For allotments under paragraph (1), there are authorized to be appropriated $3,000,000 for fiscal year 1976, $3,000,000 for fiscal year 1977, $3,000,000 for fiscal year 1978, $9,000,000 for the fiscal year ending September 30, 1979, $12,000,000 for the fiscal year ending September 30, 1980, and $15,000,000 for the fiscal year ending September 30, 1981. The provisions of section 1913 of Title 18 shall be applicable to all moneys authorized under the provisions of this section.

As amended Pub.L. 95-602, Title V, § 508, Nov. 6, 1978, 92 Stat. 3007.

SUBCHAPTER II—UNIVERSITY AFFILIATED FACILITIES

§ 6031. Grants

Authorization

(a) From appropriations under section 6033 of this title, the Secretary shall make grants to university affiliated facilities to assist in the administration and operation of the activities described in section 6001(10) of this title.

Additional grants; activities

(b) The Secretary may make one or more grants to a university affiliated facility receiving a grant under subsection (a) of this section to support one or more of the following activities:

(1) Conducting a feasibility study of the ways in which it, singly or jointly with other university affiliated facilities which have received a grant under subsection (a) of this section, can establish and operate one or more satellite centers which would be located in areas not served by a university affiliated facility. Such a study shall be carried out in consultation with the State Planning Council for the State in which the facility is located and where the satellite center would be established.

(2) Assessing the need for trained personnel in providing assistance to persons with developmental disabilities.

(3) Provision of service-related training to practitioners providing services to persons with developmental disabilities.

(4) Conducting an applied research program designed to produce more efficient and effective methods (A) for the delivery of services to persons with

developmental disabilities, and (B) for the training of professionals, paraprofessionals, and parents who provide these services.

The amount of a grant under paragraph (1) may not exceed $25,000.

Payments for cost of establishing and maintaining satellite centers; study

(c) The Secretary may make grants to pay part of the costs of establishing satellite centers and may make grants to satellite centers to pay part of their administration and operation costs. The Secretary may approve an application for a grant under this subsection only if the feasibility of establishing or operating the satellite center for which the grant is applied for has been established by a study assisted under this section.

As amended Pub.L. 95-602, Title V, § 509, Nov. 6, 1978, 92 Stat. 3008.

§ 6032. Administrative provisions

Standards for university affiliated facilities

(a) Not later than six months after November 6, 1978, the Secretary shall establish by regulation standards for university affiliated facilities. These standards for facilities shall reflect the special needs of persons with developmental disabilities who are of various ages, and shall include performance standards relating to each of the activities described in section 6001(10) of this title.

Application; contents

(b) No grant may be made under section 6031 of this title unless an application therefor is submitted to, and approved by, the Secretary. Such an application shall be submitted in such form and manner, and contain such information, as the Secretary may require. Such an ap-

plication shall be approved by the Secretary only if the application contains or is supported by reasonable assurances that—

(1) the making of the grant will (A) not result in any decrease in the use of State, local, and other non-Federal funds for services for persons with developmental disabilities and for training of persons to provide such services, which funds would (except for such grant) be made available to the applicant, and (B) be used to supplement and, to the extent practicable, increase the level of such funds; and

(2) (A) the applicant's facility is in full compliance with the standards established under subsection (a) of this section, or

(B) (i) the applicant is making substantial progress toward bringing the facility into compliance with such standards, and (ii) the facility will, not later than three years after the date of approval of the initial application or the date standards are promulgated under subsection (a) of this section, whichever is later, fully comply with such standards.

Application review procedures

(c) The Secretary shall establish such a process for the review of applications for grants under section 6031 of this title as will ensure, to the maximum extent feasible, that each Federal agency that provides funds for the direct support of the applicant's facility reviews the application.

Grant amounts

(d) (1) The amount of any grant under section 6031 (a) of this title to a university affiliated facility shall not be less than $150,000 for any fiscal year.

(2) The amount of any grant under section 6031(c) of this title to a satellite center which has received a

grant under section 6031(b) of this title (as in effect before November 6, 1978) for the fiscal year ending September 30, 1978, shall not be less than $75,000 for any fiscal year.

As amended Pub.L. 95-602, Title V, § 509, Nov. 6, 1978, 92 Stat. 3009.

§ 6033. Authorization of appropriations

(a) For the purpose of making grants under section 6031 of this title, there are authorized to be appropriated $12,000,000 for the fiscal year ending September 30, 1979, $14,000,000 for the fiscal year ending September 30, 1980, and $16,000,000 for the fiscal year ending September 30, 1981.

(b) Of the sums appropriated under subsection (a) of this section not less than—

(1) $9,000,000 for the fiscal year ending September 30, 1979,

(2) $10,000,000 for the fiscal year ending September 30, 1980, and

(3) $11,000,000 for the fiscal year ending September 30, 1981, shall be made available for grants under subsections (a) and (c) of section 6031 of this title to qualified applicants which received grants under section 6031 of this title during the fiscal year ending September 30, 1978. The remainder of the sums appropriated for such fiscal years shall be made available as the Secretary determines, except that not less than 40 percent of such remainder shall be made available for grants under subsections (b) and (c) of section 6031 of this title.

As amended Pub.L. 95-602, Title V, § 509, Nov. 6, 1978, 92 Stat. 3010.

[§§ 6041 to 6043. Omitted (1978 amend.)]

SUBCHAPTER III—STATE ALLOTMENTS

§ 6061. Authorization of appropriations

For allotments under section 6062 of this title, there are authorized to be appropriated $40,000,000 for fiscal year 1976, $50,000,000 for fiscal year 1977, $60,000,000 for fiscal year 1978, $55,000,000 for the fiscal year ending September 30, 1979, $65,000,000 for the fiscal year ending September 30, 1980, and $75,000,000 for the fiscal year ending September 30, 1981.

As amended Pub.L. 95-602, Title V, § 510(a), Nov. 6, 1978, 92 Stat. 3010.

§ 6062. Allotments to States

Determination of amount

(a) (1) In each fiscal year, the Secretary shall, in accordance with regulations and this paragraph, allot the sums appropriated for such year under section 6061 of this title among the States on the basis of—

(A) the population,

(B) the extent of need for services for persons with developmental disabilities, and

(C) the financial need,

of the respective States. Sums allotted to the States under this section shall be used in accordance with approved State plans under section 6063 of this title for the provision under such plans of services for persons with developmental disabilities.

(2) For any fiscal year, the allotment under paragraph (1)—

(A) to each of American Samoa, Guam, the Virgin Islands, the Northern Mariana Islands, or the Trust Territory of the Pacific Islands may not be less than $100,000, and

(B) to any other State may not be less than the greater of $250,000, or the amount of the allotment (determined without regard to subsection (d) of this section) received by the State for the fiscal year ending September 30, 1978.

(3) In determining, for purposes of paragraph (1)(B), the extent of need in any State for services for persons with developmental disabilities, the Secretary shall take into account the scope and extent of the services described, pursuant to section 6063(b)(2)(B) of this title, in the State plan of the State.

Apportionment of allotment among State agencies

(b) Whenever the State plan approved in accordance with section 6063 of this title provides for participation of more than one State agency in administering or supervising the administration of designated portions of the State plan, the State may apportion its allotment among such agencies in a manner which, to the satisfaction of the Secretary, is reasonably related to the responsibilities assigned to such agencies in carrying out the purposes of the State plan. Funds so apportioned to State agencies may be combined with other State or Federal funds authorized to be spent for other purposes, provided the purposes of the State plan will receive proportionate benefit from the combination.

Combined allotments to State involved in joint effort

(c) Whenever the State plan approved in accordance with section 6063 of this title provides for cooperative or joint effort between States or between or among agencies, public or private, in more than one State, portions of funds allotted to one or more such cooperating States may be combined in accordance with the agreements between the agencies involved.

Reallotment of funds not required by State

(d) The amount of an allotment to a State for a fiscal year which the Secretary determines will not be required by the State during the period for which it is available for the purpose for which allotted shall be available for reallotment by the Secretary from time to time, on such date or dates as he may fix (but not earlier than thirty days after he has published notice of his intention to make such reallotment in the Federal Register), to other States with respect to which such a determination has not been made, in proportion to the original allotments of such States for such fiscal year, but with such proportionate amount for any of such other States being reduced to the extent it exceeds the sum the Secretary estimates such State needs and will be able to use during such period; and the total of such reductions shall be similarly reallotted among the States whose proportionate amounts were not so reduced. Any amount so reallotted to a State for a fiscal year shall be deemed to be a part of its allotment under subsection (a) of this section for such fiscal year.

As amended Pub.L. 95-602, Title V, § 510(b), Nov. 6, 1978, 92 Stat. 3010.

§ 6063. State plans

Submission and approval

(a) Any State desiring to take advantage of this subchapter must have a State plan submitted to and approved by the Secretary under this section.

Conditions for approval

(b) In order to be approved by the Secretary under this section, a State plan for the provision of services for persons with developmental disabilities must meet the following requirements:

(1) (A) The plan must provide for the establishment of a State Planning Council, in accordance with section 6067 of this title, for the assignment to the Council of personnel in such numbers and with such qualifications as the Secretary determines to be adequate to enable the Council to carry out its duties under that section, and for the identification of the personnel so assigned.

(B) The plan must designate the State agency or agencies which shall administer or supervise the administration of the State plan and, if there is more than one such agency, the portion of such plan which each will administer (or the portion the administration of which each will supervise).

(C) The plan must provide that each State agency designated under subparagraph (B) will make such reports, in such form and containing such information, as the Secretary may from time to time reasonably require, and will keep such records and afford such access thereto as the Secretary finds necessary to verify such reports.

(D) The plan must provide for such fiscal control and fund accounting procedures as may be necessary to assure the proper disbursement of and accounting for funds paid to the State under this subchapter.

(2) The plan must—

(A) set out the specific objectives to be achieved under the plan and a listing of the programs and resources to be used to meet such objectives;

(B) describe (and provide for the review annually and revision of the description not less often than once every three years) (i) the extent and scope of services being provided, or to

be provided, to persons with developmental disabilities under such other State plans for Federally assisted State programs as the State conducts relating to education for the handicapped, vocational rehabilitation, public assistance, medical assistance, social services, maternal and child health, crippled children's services, and comprehensive health and mental health, and under such other plans as the Secretary may specify, and (ii) how funds allotted to the State in accordance with section 6062 of this title will be used to complement and augment rather than duplicate or replace services for persons with developmental disabilities which are eligible for Federal assistance under such other State programs;

(C) for each fiscal year, assess and describe the extent and scope of the priority services (as defined in section 6001(8)(B) of this title) being or to be provided under the plan in the fiscal year; and

(D) establish a method for the periodic evaluation of the plan's effectiveness in meeting the objectives described in subparagraph (A).

(3) The plan must contain or be supported by assurances satisfactory to the Secretary that—

(A) the funds paid to the State under section 6062 of this title will be used to make a significant contribution toward strengthening services for persons with developmental disabilities through agencies in the various political subdivisions of the State;

(B) part of such funds will be made available by the State to public or nonprofit private entities;

(C) such funds paid to the State under section 6062 of this title will be used to supplement and to increase the level of funds that would otherwise be made available for the purposes for which Federal funds are provided and not to supplant such non-Federal funds; and

(D) there will be reasonable State financial participation in the cost of carrying out the State plan.

(4) (A) The plan must—

(i) provide for the examination not less often than once every three years of the provision, and the need for the provision, in the State of the four different areas of priority services (as defined in section 6001(8) (B) of this title; and

(ii) provide for the development, not later than the second year in which funds are provided under the plan after November 6, 1978, and the timely review and revision of a comprehensive statewide plan to plan, financially support, coordinate, and otherwise better address, on a statewide and comprehensive basis, unmet needs in the State for the provision of at least one of the areas of priority services, such area or areas to be specified in the plan, and (at the option of the State) for the provision of an additional area of services for the developmentally disabled, such area also to be specified in the plan.

(B) (i) Except as provided in clause (iii), the plan must provide that not less than $100,000 or 65 percent of the amount available to the State under section 6062 of this title, whichever is greater, will be expended, as provided in clause (ii), for service activities in the areas of services specified in the plan under subparagraph (A) (ii).

(ii) For any year in which the sums appropriated under section 131 do not exceed—

(I) $60,000,000, not less than $100,000 or 65 percent of the amount available to the State under section 6062 of this title, whichever is greater, must be expended for service activities in no more than two of the areas of services specified in the plan under subparagraph (A) (ii), and

(II) $90,000,000, not less than $100,000 or 65 percent of the amount available to the State under section 6062 of this title, whichever is greater, must be expended for service activities in no more than three of the areas of services specified in the plan under subparagraph (A) (ii).

(iii) A State, in order to comply with clause (i) for a fiscal year beginning before January 1, 1980, is not required to reduce the amount which is available to it under section 6062 of this title and which is expended for planning activities below the amount so expended for planning activities in the preceding fiscal year, if substantially the remainder of the amount available to the State, which is expended for other than administration, is expended for service activities in the areas of services specified in the plan under subparagraph (A) (ii). For purposes of this clause, expenditures for planning activities do not include any expenditures for service activities (as defined in clause (iv)).

(iv) For purposes of this subparagraph, the term "service activities" includes, with respect to an area of services, provision of services in the area, model service programs in the area, activities to increase the capacity of institutions and agencies to provide

services in the area, coordinating the provision of services in the area with the provision of other services, outreach to individuals for the provision of services in the area, the training of personnel to provide services in the area, and similar activities designed to expand the use and availability of services in the area.

(C) Notwithstanding subparagraph (B), upon the application of a State, the Secretary, pursuant to regulations which the Secretary shall prescribe, may permit the portion of the funds which must otherwise be expended under the State plan for service activities in a limited number of areas of services to be expended for service activities in additional areas of services if he determines that the expenditures of the State on service activities in the initially specified areas of services has reasonably met the need for those services in the State in comparison to the extent to which the need for such additional area or areas of services has been met in such State. Such additional areas shall, to the maximum extent feasible, be areas within the areas of priority services (as defined in section 6001(8)(B) of this title).

(D) The plan must provide that special financial and technical assistance shall be given to agencies or entities providing services for persons with developmental disabilities who are residents of geographical areas designated as urban or rural poverty areas.

(5)(A)(i) The plan must provide that services furnished, and the facilities in which they are furnished, under the plan for persons with developmental disabilities will be in accordance with standards prescribed by the Secretary in regulations.

(ii) The plan must provide satisfactory assurances that buildings used in connection with the delivery of services assisted under the plan will meet

standards adopted pursuant to the Act of August 12, 1968 (known as the Architectural Barriers Act of 1968).

(B) The plan must provide that services are provided in an individualized manner consistent with the requirements of section 6011 of this title (relating to habilitation plans).

(C) The plan must contain or be supported by assurances satisfactory to the Secretary that the human rights of all persons with developmental disabilities (especially those persons without familial protection) who are receiving treatment, services, or habilitation under programs assisted under this chapter will be protected consistent with section 6010 of this title (relating to rights of the developmentally disabled).

(D) The plan must provide assurances that the State has undertaken affirmative steps to assure the participation in programs under this chapter of individuals generally representative of the population of the State, with particular attention to the participation of members of minority groups.

(6) The plan must provide for—

(A) an assessment of the adequacy of the skill level of professionals and paraprofessionals serving persons with developmental disabilities in the State and the adequacy of the State programs and plans supporting training of such professionals and paraprofessionals in maintaining the high quality of services provided to persons with developmental disabilities in the State; and

(B) the planning and implementation of an evaluation system (in accordance with section 6009(a) of this title).

(7) (A) The plan must provide for the maximum utilization of all available community resources including volunteers serving under the Domestic Volunteer Service Act of 1973 (Public Law 93-113) and other appropriate voluntary organizations, except that such volunteer services shall supplement, and shall not be in lieu of, services of paid employees.

(B) The plan must provide for fair and equitable arrangements (as determined by the Secretary after consultation with the Secretary of Labor) to protect the interests of employees affected by actions under the plan to provide alternative community living arrangement services (as defined in section 6001(8)(E) of this title), including arrangements designed to preserve employee rights and benefits and to provide training and retraining of such employees where necessary and arrangements under which maximum efforts will be made to guarantee the employment of such employees.

(8) The plan also must contain such additional information and assurances as the Secretary may find necessary to carry out the provisions and purposes of this subchapter.

Approval of conforming plan; notice and hearing prior to final disapproval

(c) The Secretary shall approve any State plan and any modification thereof which complies with the provisions of subsection (b) of this section. The Secretary shall not finally disapprove a State plan except after reasonable notice and opportunity for a hearing to the State.

Administrative expenditures; limitation of amount; payments; advances or reimbursement, installments

(d) (1) At the request of any State, a portion of any allotment or allotments of such State under this subchapter for any fiscal year shall be available to pay one-half (or such smaller share as the State may request) of the expenditures found necessary by the Secretary for the proper and efficient administration of the State plan approved under this section; except that not more than 5 per centum of the total of the allotments of such State for any fiscal year, or $50,000, whichever is less; shall be available for the total expenditures for such purpose by all of the State agencies designated under subsection (b) (1) (B) of this section for the administration or supervision of the administration of the State plan. Payments under this paragraph may be made in advance or by way of reimbursement, and in such installments, as the Secretary may determine.

(2) Any amount paid under paragraph (1) to any State for any fiscal year shall be paid on condition that there shall be expended from the State sources for such year for administration of the State plan approved under this section not less than the total amount expended for such purposes from such sources during the previous fiscal year.

As amended Pub.L. 95-602, Title V, § 511, Nov. 6, 1978, 92 Stat. 3011.

§ 6064. Payment to States for planning, administration, and services

From each State's allotments for a fiscal year under section 6062 of this title, the State shall be paid the Federal share of the expenditures, other than expenditures for construction, incurred during such year under its State plan approved under this subchapter. Such pay-

ments shall be made from time to time in advance on the basis of estimates by the Secretary of the sums the State will expend under the State plan, except that such adjustments as may be necessary shall be made on account of previously made underpayments or overpayments under this section.

As amended Pub.L. 95-602, Title V, § 514(b), Nov. 6, 1978, 92 Stat. 3017.

§ 6065. Withholding of payments to States for planning, administration, and services

Whenever the Secretary, after reasonable notice and opportunity for hearing to the State Planning Council and the appropriate State agencies or agency, designated pursuant to section 6063(b)(1) of this title finds that—

(1) there is a failure to comply substantially with any of the provisions required by section 6063 of this title to be included in the State plan; or

(2) there is a failure to comply substantially with any regulations of the Secretary which are applicable to this subchapter,

the Secretary shall notify such State Council and agency or agencies that further payments will not be made to the State under section 6062 of this title (or, in his discretion, that further payments will not be made to the State under section 6062 of this title for activities in which there is such failure), until he is satisfied that there will no longer be such failure. Until he is so satisfied, the Secretary shall make no further payment to the State under section 6062 of this title, or shall limit further payment under section 6062 of this title to such State to activities in which there is no such failure.

As amended Pub.L. 95-602, Title V, § 514(c), Nov. 6, 1978, 92 Stat. 3017.

§ 6066. Nonduplication of payments

In determining the amount of any State's Federal share of the expenditures incurred by it under a State plan approved under section 6063 of this title, there shall be disregarded (1) any portion of such expenditures which are financed by Federal funds provided under any provision of law other than section 6062 of this title, and (2) the amount of any non-Federal funds required to be expended as a condition of receipt of such Federal funds. Pub.L. 88-164, Title I, § 136, formerly § 140, as added Pub.L. 91-517, Title I, § 101(b), Oct. 30, 1970, 84 Stat. 1324, renumbered and amended Pub.L. 94-103, Title I, § 115, Title III, § 302(a), (b)(4), Oct. 4, 1975, 89 Stat. 493, 506.

§ 6067. State Planning Councils

Establishment; membership

(a)(1) Each State which receives assistance under this subchapter shall establish a State Planning Council which will serve as an advocate for persons with developmental disabilities (as defined in section 6001(7) of this title).

The members of the State Planning Council of a State shall be appointed by the Governor of the State from among the residents of that State. The Governor of each State shall make appropriate provisions for the rotation of membership on the Council of his respective State. Each State Planning Council shall at all times include in its membership representatives of the principal State agencies, higher education training facilities, local agencies, and nongovernmental agencies and groups concerned with services to persons with developmental disabilities in that State.

(2) At least one-half of the membership of each such Council shall consist of persons who—

(A) are persons with developmental disabilities or parents or guardians of such persons, or

(B) are immediate relatives or guardians of persons with mentally impairing developmental disabilities.

who are not employees of a State agency which receives funds or provides services under this subchapter, who are not managing employees (as defined in section 1320a-5(b) of this title) of any other entity which receives funds or provides services under this part, and who are not persons with an ownership or control interest (within the meaning of section 1320a(a)(3) of this title) with respect to such an entity.

(3) Of the members of the Council described in paragraph (2)—

(A) at least one-third shall be persons with developmental disabilities, and

(B)(i) at least one-third shall be individuals described in subparagraph (B) of paragraph (2), and (ii) at least one of such individuals shall be an immediate relative or guardian of an institutionalized person with a developmental disability.

Duties

(b) Each State Planning Council shall—

(1) develop jointly with the State agency or agencies designated under section 6063(b)(1)(B) of this title the State plan required by this part, including the specification of areas of services under section 6063(b)(4)(A)(ii) of this title;

(2) monitor, review, and evaluate, not less often than annually, the implementation of such State plan;

(3) to the maximum extent feasible, review and comment on all State plans in the State which relate to programs affecting persons with developmental disabilities; and

(4) submit to the Secretary, through the Governor, such periodic reports on its activities as the Secretary may reasonably request, and keep such records and afford such access thereto as the Secretary finds necessary to verify such reports.

As amended Pub.L. 95-602, Title V, § 512, Nov. 6, 1978, 92 Stat. 3015.

§ 6068. Appeals; petition; record; jurisdiction of courts of appeals; conclusiveness of findings; review by Supreme Court; stay of administrative action

If any State is dissatisfied with the Secretary's action under section 6063(c) or section 6065 of this title, such State may appeal to the United States court of appeals for the circuit in which such State is located, by filing a petition with such court within sixty days after such action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary, or any officer designated by him for that purpose. The Secretary thereupon shall file in the court the record of the proceedings on which he based his action, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall have jurisdiction to affirm the action of the Secretary or to set it aside, in whole or in part, temporarily or permanently, but until the filing of the record, the Secretary may modify or set aside his order. The findings of the Secretary as to the facts, if supported by substantial evidence, shall be conclusive, but the court, for good cause shown, may remand the case to the Secretary to take further evidence, and the Secretary may thereupon make new or modified findings of the fact and may modify his previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence. The judgment of the

court affirming or setting aside, in whole or in part, any action of the Secretary shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28. The commencement of proceedings under this section shall not, unless so specifically ordered by the court, operate as a stay of the Secretary's action.

Pub.L. 88-164, Title I, § 138, formerly § 142, as added, renumbered, and amended Pub.L. 94-103, Title I, § 117, Title III, § 302(a), (b)(5), Oct. 4, 1975, 89 Stat. 494, 506.

SUBCHAPTER IV—SPECIAL PROJECT GRANTS

§ 6081. Grant authority

Demonstrations

(a) The Secretary may make project grants to public or nonprofit private entities for—

(1) demonstrations (and research and evaluation in connection therewith) for establishing programs which hold promise of expending or otherwise improving services (particularly priority services) to persons with developmental disabilities (especially those who are disadvantaged or multihandicapped); and

(2) demonstrations (and research, training, and evaluation in connection therewith) for establishing programs which hold promise of expanding or otherwise improving protection and advocacy services related to the state protection and advocacy system (described in section 6012 of this title).

Specific projects

(b) Grants provided under subsection (a) of this section shall include grants for—

(1) public awareness and public education programs to assist in the elimination of social, attitudinal, and environmental barriers confronted by persons with developmental disabilities;

(2) coordinating and using all available community resources in meeting the needs of persons with developmental disabilities (especially those from disadvantaged backgrounds);

(3) demonstrations of the provision of services to persons with developmental disabilities who are also disadvantaged because of their economic status;

(4) technical assistance relating to services and facilities for persons with developmental disabilities, including assistance in State and local planning or administration respecting such services and facilities;

(5) training of specialized personnel needed for the provision of services for persons with developmental disabilities or for research directly related to such training;

(6) developing or demonstrating new or improved techniques for the provision of services to persons integrated service projects);

(7) gathering and disseminating information relating to developmental disabilities;

(8) improving the quality of services provided in and the administration of programs for such persons; and

(9) developing or demonstrating innovative methods to attract and retain professionals to serve in rural areas in the habilitation of persons with developmental disabilities.

Determination of priorities; procedures insuring participation of disabled

(c) The Secretary shall establish procedures to insure participation of persons with developmental disabilities and their parents or guardians in determining priorities to be utilized by the Secretary in making grants under this section.

Applications; approval by Secretary; contents; review and commentary of State Planning Councils

(d) No grant may be made under subsection (a) of this section unless an application therefor has been submitted to, and approved by, the Secretary. Such application shall be in such form, submitted in such manner, and contain such information, as the Secretary shall by regulation prescribe. The Secretary may not approve such an application unless the State in which the applicant's project will be conducted has a State plan approved under subchapter III of this chapter. The Secretary shall provide to the State Planning Council for the State in which an applicant's project will be conducted an opportunity to review the application for such project and to submit its comments thereon.

Payments; advances or reimbursement; intervals; conditions; amount of grants; exclusions

(e) Payments under grants under subsection (a) of this section may be made in advance or by way of reimbursement, and at such intervals and on such conditions, as the Secretary finds necessary. The amount of any grant under subsection (a) of this section shall be determined by the Secretary. In determining the amount of any grant under subsection (a) of this section for the costs of any project, there shall be excluded from such costs an amount equal to the sum of (1) the amount of any other Federal grant which the applicant has ob-

tained, or is assured of obtaining, with respect to such project, and (2) the amount of any non-Federal funds required to be expended as a condition of such other Federal grant.

Authorization of appropriations

(f) For the purpose of making payments under grants under subsection (a) of this section, there are authorized to be appropriated $18,000,000 for fiscal year 1976, $22,000,000 for fiscal year 1977, $25,000,000 for fiscal year 1978, $20,000,000 for the fiscal year ending September 30, 1979, $22,000,000 for the fiscal year ending September 30, 1980, and $26,000,000 for the fiscal year ending September 30, 1981.

Funds for projects of national significance

(g) Of the funds appropriated under subsection (f) of this section for any fiscal year, not less than 25 per centum of such funds shall be used for projects which the Secretary determines are of national significance.

Use of funds; restriction

(h) No funds appropriated under the Public Health Service Act, under this chapter (other than under subsection (f) of this section), or under section 774 of Title 29 may be used to make grants under subsection (a) of this section.

As amended Pub.L. 95-602, Title V, §§ 504(b)(2), (3), 513, Nov. 6, 1978, 92 Stat. 3006, 3016.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 78-1999

TERRI LEE HALDERMAN, a retarded citizen, by her mother and guardian, Winifred Halderman; LARRY TAYLOR, a retarded citizen, by his parents and guardians, Elmer and Doris Taylor; KENNY TAYLOR, a minor, a retarded citizen, by his parents and guardians, Elmer and Doris Taylor; ROBERT SOBETSKY, a minor, a retarded citizen, by his parents and guardians, Frank and Angela Sobetsky; THERESA SOBETSKY, a retarded citizen, by her parents and guardians, Frank and Angela Sobetsky; NANCY BETH BOWMAN, a retarded citizen, by her parents and guardians, Mr. and Ms. Horace Bowman; LINDA TAUB, a retarded citizen, by her parents and guardians, Mr. and Mrs. Allen Taub; GEORGE SOROTOS, a minor, a retarded citizen, by his foster parents, William and Marion Caranfa, all of the above individually and on behalf of all others similarly situated; THE PARENTS AND FAMILY ASSOCIATION OF PENNHURST

PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS, JO SUZANNE MOSKOWITZ, a minor, by her parents and next friends, Leonard and Nancy Moskowitz, ROBERT HIGHT, a minor, by his parents and next friends, John and Jeanne Hight, DAVID PREUSCH, a minor by his parents and next friends, Calvin and Elizabeth Preusch, and CHARLES DINOLFI, on behalf of themselves and all others similarly situated,

Plaintiffs-Intervenors

UNITED STATES OF AMERICA,
Plaintiff-Intervenors

vs.

PENNHURST STATE SCHOOL & HOSPITAL, DEPARTMENT OF PUBLIC WELFARE OF THE COMMONWEALTH OF PENNSYLVANIA, FRANK S. BEAL, Secretary of the Department of Public Welfare, STANLEY MEYERS, Deputy Secretary for Mental Retardation, Department of Public Welfare, HELENE WOHLGEMUTH, Former Secretary, Department of Public Welfare, ALDO COLAUTTI, Executive Deputy Secretary, Department of Public Welfare, WILBUR HOBBS, Deputy Secretary for Southeastern Region, Department of Public Welfare, RUSSELL RICE, JR., Commissioner of Mental Retardation for Southeastern Region, Department of Public Welfare, C. DUANE YOUNGBERG, Superintendent, Pennhurst State School & Hospital, ROBERT SMILOVITZ, Former Assistant Superintendent, Pennhurst State School & Hospital, JOSEPH FOSTER, Assistant Superintendent, Pennhurst State School & Hospital, MARGARET GREEN, BETTY UPHOLD, ALICE BARTON, P.E. KLICK, DR. PAROCCA, HELEN FRANCIS, employees and agents of Pennhurst State School & Hospital, JOHN DOCTOR, JAMES NURSE, JANE AIDE, JILL THERAPIST, RICHARD ROE, JANE DOE, unknown and unnamed staff, employees and agents of Pennhurst State School & Hospital, each individual Defendant sued individually and in his or her official capacity, GEORGE METZGER, JOSEPH CATANIA, and ROGER BOWERS, Commissioners for Bucks County, ROBERT STREBL, EARL BAKER, and LEO MCDERMOTT, Commissioners for Chester County, FAITH R. WHITTLESEY, CHARLES KEELER, and WILLIAM SPRINGLER, Commissioners for Delaware County, A. RUSSELL PARKHOUSE, FRANK W. JENKINS and LAWRENCE H. CURRY, Commissioners for Montgomery County, MAYOR FRANK L. RIZZO and THE CITY COUNCIL OF PHILA-

DELPHIA, as Authorities for Philadelphia County, PETER BODENHEIMER, Mental Health/Mental Retardation Administration for Bucks County, WILLIAM A. MCKENDRY, Mental Health/Mental Retardation Administrator for Chester County, P. PAUL BURRICHTER, Mental Health/Mental Retardation Administrator for Delware County, HERMANN A. ROETHER, Mental Health/Mental Retardation Administrator for Montgomery County, and LEON SOFFER, Mental Health/Mental Retardation Administrator for Philadelphia County.

APPLICANTS FOR INTERVENTION: THE PENNHURST PARENTS-STAFF ASSOCIATION.

Appellants

D.C. Civil No. 74-1345

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued: January 9, 1979

Before: SEITZ, *Chief Judge*,
GIBBONS and HIGGINBOTHAM, Circuit Judges

Submitted En Banc Pursuant to Rule 12(6)

September 6, 1979

Before: SEITZ, *Chief Judge*, ALIDSERT, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*

(Opinion Filed December 13, 1979)

OPINION OF THE COURT

Gibbons, *Circuit Judge:*

In this companion case to Halderman, et al. v. Pennhurst State School and Hospital, et al., Nos. 78-1490,

78-1564, 78-1602, the Pennhurst Parents-Staff Association, et al. appeal from an order denying their motion to intervene. The class action in which they sought intervention concerns the conditions that the mentally retarded have been subjected to at Pennhurst State School and Hospital and is described in detail in the opinion disposing of those appeals. The plaintiff class in that action included all retarded persons who, as of May 30, 1974 and at any time subsequent, have been or may become residents of Pennhurst. The court, on December 23, 1977, made findings of fact and conclusions of law generally favoring the relief sought by the original and intervening plaintiffs. After proceeding addressed to the scope of relief, the court, on March 17, 1978, entered a comprehensive injunction requiring the ultimate phasing out of Pennhurst and the substitution of community living facilities for the benefit of the plaintiff class. No motion to intervene was made before the entry of the March 17, 1978, judgment. On April 11, 1978, the Philadelphia County defendants filed a notice of appeal, and on April 13, 1978, the Commonwealth defendants did likewise. The appellants' motion for intervention was filed in the district court on April 13, 1978.

The district court ruled on that motion in an opinion holding that since the motion was filed after a notice of appeal had been filed, only the court of appeals had jurisdiction. The court also indicated, however, that had the motion been filed prior to April 11, 1978, it would probably have been denied as untimely. When the motion was made, the action had been pending for over four years, a nine week trial on the merits had ended over a year before, the opinion on the merits was filed six months before, and a final judgment had been entered almost a month before. The applicants for intervention included among their grounds for intervention their desire to file a Rule 59 motion, Fed. R. Civ. P. 59, but the

trial court noted that the time for making such a motion had expired. They also expressed a desire to file a Rule 60(b) motion, Fed. R. Civ. P. 60(b), but set forth no facts which would justify Rule 60(b) relief. Finally, the applicants for intervention expressed a desire to intervene in order to participate in the appeals from the March 17, 1978 order. The district court considered post-judgment intervention for that purpose to be a matter solely within the jurisdiction of this court. On June 21, 1978, an order was entered dismissing the motion to intervene. This appeal followed. We affirm.

Both Rules 24(a) and 24(b), Fed. R. Civ. P. 24(a), 24(b), require "timely" application for intervention. A refusal to permit intervention for reasons of timeliness is reviewed by an appellate court only for abuse of discretion. *Commonwealth of Pa.* v. *Rizzo*, 530 F.2d 501, 506 (3d Cir.) (quoting *NAACP* v. *New York*, 413 U.S. 345, 365-66 (1973)), *cert. denied*, 426 U.S. 921 (1976). Certainly, an effort to intervene after a judgment has become final and after the time for making a Rule 59 motion has expired, presents an extreme example of untimeliness, at least when, as here, the applicants for intervention seek, *inter alia*, a reopening of the record. The Supreme Court has recognized, however, that where the purpose of a motion to intervene is to obtain appellate review of a district court order determining the status of a class, the motion may be considered timely if filed within the time limit for filing a notice of appeal prescribed by Rule 4(a), Fed. R. App. P. 4(a). *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 392 (1977). Moreover, in approving the opinion in *American Brake Shoe & Foundry Co.* v. *Interborough R. T. Co.*, 3 F.R.D. 162 (S.D.N.Y. 1942), the *McDonald* court tacitly rejected the district court's view that once a notice of appeal had

been filed the court lost authority to consider the motion to intervene. 432 U.S. at 395 n.16. Thus the trial court should have considered the merits of the motion to intervene for the purpose of appealing.

Nevertheless, we affirm the dismissal of that motion because in this case the error in declining to rule on it was harmless. When the court ruled, it was clear that both the County and Commonwealth defendants were appealing. The positions that they ultimately took in their appeals adequately represented the interests of the applicants—a putative defendant class consisting of Pennsylvania citizens opposed to the relief ordered in the judgment. The County and Commonwealth defendants argued vigorously against the relief ordered in the judgment, including the eventual closing of Pennhurst. Moreover, we granted applicants leave in Nos. 78-1490, 78-1564 and 78-1602 to file a brief amicus curiae, and addressed in our opinion disposing of those appeals, objections to the class certification identical to those of these applicants for intervention. In addition, as the district court observed in denying their motion to intervene, applicants will have ample opportunity to present to the Special Master their particular views on the appropriate relief. Thus, no prejudice to applicants' interest has been shown to have occurred by the denial of their motion to intervene in order to appeal.

In our September 6, 1978 order, which granted the applicants for intervention leave to file a brief amicus curiae, we denied their motion to intervene in this court. That denial is without prejudice to any motion that they may want to make to intervene for the purpose of petitioning to the United States Supreme Court for a writ of certiorari—if they fear that the appellants in the

main Pennhurst case will decide not to pursue such a remedy. At this time we express no view as to the merits of such a motion.

The order of the district court dismissing the motion to intervene will be affirmed.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 78-1490, 78-1564 & 78-1602

TERRY LEE HALDERMAN, ETC., *et al.*,

PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS, *et al.*,
Plaintiffs-Intervenors,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor

v.

PENNHURST STATE SCHOOL & HOSPITAL, *et al.*,
Commonwealth of Pennsylvania Defendants
Pennhurst State School & Hospital, et al.,
Appellants in No. 78-1490

George Metzger, et al., *Appellants in No. 78-1564*

Mayor Frank L. Rizzo, et al., *Appellants in No. 78-1602*

(D. C. Civil No. 74-1345)

Present: SEITZ, *Chief Judge*, ALDISERT, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*

On the motion of the Pennhurst Parent-Staff Association to intervene for the purpose of filing a petition for certiorari to the United States Supreme Court for review of the en banc decision of this court in Nos. 78-1490, 78-1564 and 78-1602, it is,

ORDERED that the mandate of this court be and is hereby recalled for the sole purpose of considering the motion to intervene, and for no other purpose, and without otherwise affecting its operation; and it is further

ORDERED that the district court shall retain the record; and it is further

ORDERED that the motion to intervene for the purpose of filing a petition for certiorari to the United States Supreme Court is granted.

By the Court,
JOHN J. GIBBON

/s/ John J. Gibbon
Circuit Judge

Dated: March 4, 1980

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 74-1345

TERRI LEE HALDERMAN, *et al.*,
Plaintiffs

v.

PENNHURST STATE SCHOOL AND HOSPITAL, *et al.*,
Defendants

UNITED STATES OF AMERICA,
Plaintiff-Intervenor

PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS, *et al.*,
Plaintiffs-Intervenors

MEMORANDUM

BRODERICK, J. February 22, 1980.

The certified judgment of the Court of Appeals for the Third Circuit, which issued on January 4, 1980, reversed in part this Court's decision of December 23, 1978 and remanded the matter to this Court for further proceedings. This Memorandum discusses the changes which will be made in the prior Orders of this Court.

This Court previously held that habilitation of the retarded was not possible in Pennhurst, and ordered that all Pennhurst residents and those on its waiting list should be placed in community living arrangements appropriate to their individual needs. The Circuit Court agreed that the retarded have a right to habilitation, did not find clearly erroneous this Court's "determination that, for the retarded class members as a whole, Pennhurst

cannot be an appropriate setting in which to provide habilitation," but concluded that "the trial court did not adequately canvass the discrete needs of *individual* patients." *Halderman* v. *Pennhurst*, No. 78-1490, slip op. at 21-39 (3d Cir., Dec. 13, 1979). The Circuit Court found that "there may be some individual patients who, because of advanced age, profound degree of retardation, special needs, or for some other reason, will not be able to adjust to life outside of an institution and thus will be harmed by such a change," and remanded the case for individual determinations by the Court or Master concerning the habilitation of Pennhurst residents. *Id.* In making these individual determinations, the Court is to engage in "a presumption in favor of placing individuals in [community living arrangements.]" *Id.* at 64. The Circuit Court also held that future admissions to Pennhurst may be permitted after a determination which finds that Pennhurst is the only appropriate place for the habilitation of that individual. *Id.* at 65. Finally, the Circuit Court mandated the deletion of that portion of this Court's Order requiring the Commonwealth to provide alternative employment to all Pennhurst employees. *Id.* at 60.

In accordance with the opinion of the Circuit Court, this Court will enter an Order deleting those paragraphs of the Order of March 17, 1978 which enjoined admissions to Pennhurst. The Court will also rescind the Order of April 26, 1979 which provided services for Pennhurst employees.

The Circuit Court stressed that ". . . plaintiffs' right to habilitation in the least restrictive environment requires that they be given an individual opportunity to participate in the process by which their habilitation is chosen." *Halderman* v. *Pennhurst*, No. 78-1490, slip op. at 55 (3d Cir., Dec. 13, 1979). Prior Orders of this Court have established the right to participation in the development of the individual habilitation plan (IHP).

The original injunctive Order entered by this Court provided:

> 2. Commonwealth and county defendants, as aforesaid, are permanently enjoined to develop and to provide a written individualized program plan, formulated in accordance with professional standards . . . to provide to each an individualized habilitation program, to provide annual periodic review thereof and the opportunity to each member of plaintiff class and to his or her next friend to be heard thereon. 446 F. Supp. at 1326 (citations omitted).

While the Order of June 8, 1979 is directly applicable to the school-age residents of Pennhurst, the following statement from that Order is equally applicable to *all* Pennhurst residents:

> 17. No school-age resident of Pennhurst shall be returned to the community unless and until an appropriate community living arrangement has been established in accordance with that resident's individual habilitation plan which has been developed with the opportunity for full participation by the resident's parents or guardians and other advocates for the resident.

The IHP Guidelines developed by the Special Master, which are incorporated by reference in the Court's Order, provide detailed procedures for the development of the IHP with full participation by the resident, family and advocates.

The amendments to the Court's Orders of March 5, 1979 and June 8, 1979 provide for the continuation of this individual planning and assessment process to develop the IHP and, upon completion of the IHP, the amendments establish an impartial hearing procedure to provide for the individual determinations mandated by the Circuit Court for adult and school-age residents of Pennhurst. This Court will appoint a Master whose obligation will be

to conduct the hearing and make findings as to whether the living arrangments and services being provided the resident at Pennhurst are more beneficial to the resident's habilitation than the living arrangements and services which have been made ready in the community in accordance with the IHP. The resident, Commonwealth, County, Special Master, parent/guardian, certified advocate and/or next friend will have the opportunity to participate fully in the hearing. The amendments to the Court's prior Orders will also provide a similar procedure in connection with future admissions to Pennhurst.

Finally, there is pending before this Court a petition to intervene in the relief phase of this litigation, which was filed on behalf of:

> The Pennhurst Parents-Staff Association; Eric J. Cohen and Sheldon H. Cohen, retarded citizens, by their parents, Louis and Blanche Cohen; Sandra Spare, a retarded citizen, by her parents, William and Pauline Spare; Timothy Todd Schlosser, a retarded citizen, by his parents, Rev. Dr. L. David Schlosser and Shirley Schlosser; William Knighton, a retarded citizen, by his parents, Walter and Charlotte Knighton; and Thomas Weaver, a retarded citizen, by his parents, Charles and Katherine Weaver, all individuals on their behalf and on behalf of others similarly situated.

They seek to intervene because their interests differ from those of the existing class in that, "As residents of Pennhurst, Petitioners and their families, are opposed to the closing of Pennhurst. Petitioners do not believe that for themselves and for all members of the class they seek to represent that community living arrangements are a viable or desirable substitute for an improved and upgraded Pennhurst." (Motion to Intervene, ¶ 5). Thus, the individual applicants for intervention are members of the class who claim that their interests differ from those

of other members of the class. Since they seek to intervene *as a class*, their motion to intervene will be considered as a motion seeking decertification of the class, or as a motion to create a subclass.

The Circuit Court discussed three options available to this Court to ensure that the interests of these applicants for intervention are represented: (1) decertification of the class; (2) creation of a subclass; or (3) participation on a "case-by-case basis" in the assessment of each individual class member's particular needs. *Halderman* v. *Pennhurst*, No. 78-1490, slip op. at 54-55 (3d Cir., Dec. 13, 1979). We find that the third option discussed by the Circuit Court, i.e., individual participation in the hearing process as detailed in the amendments to this Court's Orders of March 5, 1979 and June 8, 1979 provides more than ample protection safeguarding the interests of all the retarded residents of Pennhurst, including the individual applicants for intervention. We will, therefore, deny their motion to intervene as a class. We will, however, permit the Pennhurst Parent-Staff Association, which purports to represent residents who contend that Pennhurst is more beneficial to their habilitation than community living arrangements, to intervene in the relief stages of this litigation.

ORDER

AND NOW, this 22nd day of February, 1980, the Court, for the reasons set forth in the Memorandum of this Court dated February 22, 1980, is amending its Orders dated March 17, 1978, March 5, 1979, April 26, 1979 and June 8, 1979, and hereby ORDERS that the Court will hear objections, if any, concerning the following proposed amendments on Thursday, March 6, 1980 at 10:00 a.m. in Courtroom 10-B of this United States Courthouse, 601 Market Street, Philadelphia, Pennsylvania:

I. *Order of March 17, 1978—Original Injunctive Order*

The Order of March 17, 1978 is amended by deleting therefrom ¶ 6g (employee plan) and ¶¶ 9, 10 (admissions to Pennhurst). Paragraph 11 of said Order is amended so that the first sentence reads: "The Special Master, as aforesaid, shall prepare and present to the Court, for its Order, a plan for the interim operation of Pennhurst."

II. *Order of March 5, 1979—Interim Operation of Pennhurst*

The Order of March 5, 1979 is amended by deleting therefrom ¶¶ 10.2, 10.3 and 10.4 and adding thereto the following ¶¶ 10.2, 10.3, 10.4, 10.5, 10.6 and 10.7:

10.2 *Individual Plan Development*

The Planning and Assessment Team (including, but not limited to, the Pennhurst resident, case manager, parent/guardian and/or certified advocate or next friend) shall meet to develop the Individual Habilitation Plan (IHP) for habilitation of the Pennhurst resident in an appropriate community living arrangement (CLA). The IHP shall be developed in accordance with the IHP Guidelines (Guidelines) prepared by the Special Master and incorporated herein by reference and shall include plans for the CLA and all supportive services, and emergency and respite care where necessary. Any member of the Team who has received notice of a Team meeting and fails or refuses to participate shall continue to receive notice of future Team meetings, but meetings may proceed without their participation. Team members shall have access to all records and documents necessary for developing the IHP.

In the event of disagreement among Team members as to the provisions of the IHP, the Special Master shall work with Team members and shall resolve any disagreement concerning the provisions of the IHP.

The Special Master shall review each IHP to ensure that it provides, in the least restrictive setting, such minimally adequate habilitation as will afford a reasonable opportunity for each individual to acquire and maintain such life skills as are necessary to enable him or her to cope as effectively as his or her capacities permit. The Special Master shall direct and monitor defendants in providing necessary facilities in accordance with the IHP.

10.3 *Hearing Master*

The Court shall appoint a Master, hereinafter referred to as the Hearing Master, who shall have the responsibility to conduct hearings as provided in this Order. The Hearing Master shall be independent of the Special Master previously appointed by this Court and shall be subject only to the direction of the Court.

10.4 *Implementation and Notice of Hearing*

When the Special Master approves the IHP and community services are in place, ready to receive the resident in accordance with the IHP, the Special Master shall notify the Pennhurst resident, Commonwealth, County, parent/guardian and/or certified advocate or next friend that the IHP will be implemented and the resident will move to the CLA in accordance with the IHP within forty-five (45) days. The notice shall be written, and a copy of the IHP shall be attached thereto. This notice shall be delivered in person or by certified mail, return receipt requested, and shall contain the location and description of the CLA and shall advise all parties how they may make arrangements to visit the CLA, in the event they have not done so during the planning process. The notice shall provide that the resident, parent/guardian, certified advocate or next friend may, by written demand delivered to the Hearing Master within seven

(7) days of receipt of the notice, demand a hearing to determine whether the living arrangements and services being provided the resident at Pennhurst are more beneficial to the resident's habilitation than the living arrangements and services which have been made ready in the community in accordance with the IHP. In the event the Hearing Master receives no demand for a hearing within the seven (7) day period, the Special Master shall proceed with the arrangements transferring the resident to the designated CLA.

10.5 *Hearing*

Upon receipt of a demand for a hearing, the Hearing Master shall immediately notify the Pennhurst resident, parent/guardian, certified advocate, next friend, the Special Master, County and Commonwealth of the date for the hearing, which hearing shall commence within ten (10) days of the date on which the hearing demand was received.

The Hearing Master shall have the power to fix the time and place for beginning and closing the hearing, and shall conduct the hearing according to such rules as shall be determined to be beneficial to the rights and needs of the retarded individual. The Hearing Master may require the production of evidence and rule upon the admissibility of evidence, and shall have the power to put witnesses under oath, and may examine witnesses. A tape recording of each hearing shall be made and preserved for a reasonable time by the Hearing Master.

The Pennhurst resident, parent/guardian, certified advocate, next friend, the Special Master, the County and Commonwealth shall have the opportunity to present such evidence as the Hearing Master may determine relevant to the issue of the resident's habilitation. Attendance of witnesses at the hearing may be procured by the issuance

and service of subpoenas as provided in Rule 45 of the Federal Rules of Civil Procedure.

Within ten (10) days of the completion of the hearing, the Hearing Master shall file with the Clerk of this Court a written report setting forth findings and reasons as to whether the living arrangements and services being provided the resident at Pennhurst are more beneficial to the resident's habilitation than the living arrangements and services which have been made ready in the community in accordance with the IHP and shall send copies of the report to all parties to the hearing. The Hearing Master shall, in preparing the report, take such measures as may be necessary for the protection of the retarded person's privacy.

In the event any party to the hearing takes exception to the Hearing Master's findings, said exceptions must be filed with the Court within thirty (30) days of the date the Hearing Master's report is filed with the Court.

In the event the Hearing Master determines that the resident should move to the designated CLA, the Special Master shall proceed with the arrangements transferring the resident to the CLA. In the event the Hearing Master determines that the living arrangements and services being provided at Pennhurst are more beneficial to the habilitation of the resident than those living arrangements and services which have been made ready in the community in accordance with the IHP, the Special Master shall terminate the arrangements for transferring the resident to the designated CLA.

10.6 *Provision for Change in Circumstances of Individual*

Whenever the Hearing Master has determined that Pennhurst is more beneficial to the habilitation of the resident than the CLA considered by the Hearing Master, in the event the Special Master determines that other

living arrangements and services in the community shall be more beneficial to the resident's habilitation, the Special Master shall reinitiate the planning process in accordance with ¶ 10.2.

In the event any former resident of Pennhurst who has moved to a CLA pursuant to this Order is not progressing in accordance with his or her IHP, after resort to the emergency and/or respite care provided in the IHP, the Special Master, parent/guardian, or next friend may proceed, pursuant to ¶ 10.7, to have the resident returned to Pennhurst.

10.7 *Admission to Pennhurst*

After the effective date of this Order, no county defendant shall recommend the admission of any retarded person to Pennhurst without first having made a written determination setting forth:

(1) The results of an in-depth study as to the type of living arrangements and services which will be most beneficial to the individual's habilitation;

(2) The conclusion that life in the community will not be beneficial to the individual's habilitation; and

(3) The conclusion that no alternative institution in the relevant geographic area is available.

The county shall notify the Special Master and Hearing Master of such recommendation by delivering to them a copy of the written determination. Immediately upon receipt of such document, the Hearing Master shall notify the retarded person, parent/guardian or next friend, County, Commonwealth and Special Master of a hearing to commence within ten (10) days of said notice. The purpose of the hearing shall be for the Hearing Master to make the following findings:

(1) In the event the Hearing Master determines that life in the community will not be beneficial to the habili-

tation of the retarded person, the Hearing Master shall determine whether an alternative institution in the relevant geographic area is available. If such institution is available, the Special Master shall immediately make arrangements to admit the individual to that institution. If no such institution is available, the Special Master shall immediately make arrangements to admit the individual to Pennhurst; or

(2) In the event the Hearing Master determines that life in the community will be beneficial to the habilitation of the retarded person, the Hearing Master shall determine if an appropriate CLA is available. If such CLA is available, the Special Master shall immediately make arrangements to place the individual in that CLA. If no such CLA is presently available, the Special Master shall make such arrangements as are necessary for the person's habilitation until the appropriate CLA can be made ready.

All parties to the hearing shall have the opportunity to present such evidence as the Hearing Master may determine relevant to the issue of the individual's habilitation. Attendance of witnesses may be procured as provided in ¶ 10.5.

The Hearing Master shall have all powers and duties provided in ¶ 10.5 and shall, within ten (10) days of the completion of the hearing, prepare a written report setting forth findings and reasons, shall file said report with the Clerk of this Court, sending copies of the report to all parties to the hearing, and shall take such measures in preparing the report as may be necessary for the protection of the retarded person's privacy.

In the event any party to the hearing takes exception to the Hearing Master's findings, said exceptions must be filed with the Court within thirty (30) days of the date the Hearing Master's report is filed with the Court.

III. *Order of April 26, 1979—Employee Services*

The Order of April 26, 1979 is vacated.

IV. *Order of June 8, 1979—School Age Children*

The Order of June 8, 1979 is amended by adding ¶¶ 10.2, 10.3, 10.4, 10.5, 10.6 and 10.7 set forth in III, above.

V. *Applicants for Intervention*

The motion to intervene filed by the Pennhurst Parent-Staff Association is GRANTED and the motion to intervene filed by Eric J. Cohen and Sheldon H. Cohen, retarded citizens, by their parents, Louis and Blanche Cohen; Sandra Spare, a retarded citizen, by her parents, William and Pauline Spare; Timothy Todd Schlosser, a retarded citizen, by his parents, Rev. Dr. L. David Schlosser and Shirley Schlosser; William Knighton, a retarded citizen, by his parents, Walter and Charlotte Knighton; and Thomas Weaver, a retarded citizen, by his parents, Charles and Katherine Weaver, is DENIED.

/s/ Raymond J. Broderick, J.
RAYMOND J. BRODERICK, J.

see 79

1404

see 80

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